(1)

Supreme Court, U.S.
FILED

961472 MAR 13 1997

OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRANK HOLT
Plaintiff-Petitioner

vs.

JTM INDUSTRIES, INC.
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI
to the
United States Court of Appeals
For the Fifth Circuit
(CASE NO. 95-50145)

John Patrick Atkins
Counsel of Record
Philip E. McCleery
SHEEHY, LOVELACE & MAYFIELD, P.C.
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710
(817) 772-8022
FAX (817) 772-9297
Attorneys for Petitioner

34pp

QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967 ("ADEA") and Title VII of the Civil Rights Act of 1964, ("Title VII"), prohibit an employer from retaliating against a third party for the protected activity of an employee?

2. Has Petitioner stated a claim upon which relief may be granted under the ADEA and Title VII where he and his wife work for the same employer and he is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case?

3. Does a husband have standing to assert a cause of action for retaliation, under the ADEA and Title VII where the husband and wife work for the same employer, and the husband is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

1. MR. FRANK HOLT and MRS. LINDA HOLT, residents of Mexia, Texas, the Plaintiffs in the District Court proceeding.

2. PHILIP E. McCLEERY and JOHN PATRICK ATKINS, Sheehy, Lovelace & Mayfield, P.C., Waco, Texas, attorneys for the Plaintiffs.

3. JTM INDUSTRIES, INC., a Texas corporation with its principal place of business in Kennesaw, Georgia, Defendant.

4. LAIDLAW ENVIRONMENTAL SERVICES, INC., a South Carolina corporation and parent company of JTM INDUSTRIES, INC.

5. UNITED STATES POLLUTION CONTROL, INCORPORATED ("USPCI"), a Delaware corporation with its principal place of business in Houston, Texas, former parent company of JTM INDUSTRIES, INC., and Defendant in the District Court proceeding.

6. UNION PACIFIC, parent company of USPCI.

7. LIONEL M. SCHOOLER, Gilpin, Paxson & Bersch, LLP, Houston, Texas, attorneys for Defendants USPCI and JTM INDUSTRIES, INC.

8. DAVID G. TEKELL, Naman, Howell, Smith & Lee, P.C., Waco, Texas, local counsel for Defendants USPCI and JTM INDUSTRIES, INC., in the District Court proceeding.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

CERTIFICATE OF ALL INTERESTED PARTIES ii

TABLE OF CONTENTS iv

INDEX OF AUTHORITIES vi

OPINIONS AND ORDERS OF LOWER COURTS 1

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

Whether the ADEA and Title VII prohibit an employer from retaliating against a third party for the protected activity of an employee? 12

Has Petitioner stated a claim upon which relief may be granted under the ADEA and Title VII where he and his wife work for the same employer and he is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case? 12

Does a husband have standing to assert a cause of action for retaliation, under the ADEA and Title VII where the husband and wife work for the same employer, and the husband is retaliated against as a result of his wife's filing of an administrative complaint of employment discrimination, as was found by the jury in this case? 19

CONCLUSION 22

APPENDIX A-1

INDEX OF AUTHORITIES

Page:

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 11, 16

Cairo v. OH Material Corp., 710 F.Supp. 1069 (M.D.La. 1989) 14

Clark v. R. J. Reynolds Tobacco Co., 27 FEP Cases 1628, 1982 WL 2277 (E.D.La. 1982) . 10, 14

DeMedina v. Reinhardt, 444 F.Supp. 573 (D.D.C. 1978) 10, 14, 16

EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987) 18

EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) 9, 11, 13, 18, 22

Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) 19

Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed 2d 158, 91 S.Ct. 849 (1971) 16

Hamilton v. Rodgers, 791 F.2d 439
(5th Cir. 1986) 17

Holt v. JTM Industries, Inc., 89 F.3d 1224
(5th Cir. 1996) 19, 21

Horne v. Firemen's Retirement System of St. Louis,
69 F.3d 233 (8th Cir. 1995) 20

Bob Jones University v. United States, 461 U.S. 574,
103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) 16

Kale v. Combined Ins. Co., 861 F.2d 746 (1st Cir.
1988) 17

Kombluh v. Stearns and Foster Co., 73 F.R.D. 307
(N.D. Ohio 1976) 10, 14

Lujan v. Defenders of Wildlife, 504 U.S. 555,
112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) 20

MacDonald v. Eastern Wyoming Mental Health Center,
941 F.2d 1115 (10th Cir. 1991) 17

Mandia v. ARCO Chemical Co., 618 F.Supp. 1248
(W.D.Pa. 1985) 10, 13, 22

McDonnell v. Cisneros, 84 F.3d 256
(7th Cir. 1996) 15

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) ... 11, 18

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) 18

Rabzak v. County of Berks, 815 F.2d 17 (3rd Cir. 1987) 17

Robinson v. Shell Oil Co., 1997 WL 63007 (U.S. Feb. 19, 1997) 11, 17

Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 (5th Cir. 1971) 17

Shirley v. Chrysler First, Inc., 970 F.2d 39 (5th Cir. 1992) 12

Simmons v. Lyons, 746 F.2d 265 (5th Cir. 1984) 10, 14

Thurman v. Robertshaw Control Co., 869 F.Supp. 934 (N.D.Ga. 1994) 9, 13, 22

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) 20

United States v. City of Socorro, 25 FEP 815, 1976 WL 523 (D.N.M. 1976) 10, 14

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 19

Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989) . 9, 13

Statutes:

28 U.S.C. §1254(1) 2

Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq. 2, 7, 20

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) 3, 7, 12

Miscellaneous:

EEOC Decisions Dec. 77-34 (August 16, 1977) (CCH EEOC Dec. ¶6581) 16

2 EEOC Compliance Manual §614 (April 1988) .. 15

INDEX OF APPENDICES

Page:

Opinion of United States Court of Appeals, Fifth Circuit A-1

On Petition for Rehearing and Suggestion for Rehearing and Suggestion for Rehearing En Banc A-31

Judgment of United States Court of Appeals, Fifth Circuit A-33

Judgment of United States District Court, Western District of Texas, Waco Division A-35

NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRANK HOLT

Plaintiff-Petitioner

vs.

JTM INDUSTRIES, INC.

Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS OF LOWER COURTS

The opinion and dissenting opinion of the Court of Appeals are reported at 89 F.3d 1224 and are reproduced in the Appendix filed herewith, at A-1. The unreported Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in the Appendix, at A-31. The December 24,

1996 Judgment of the Court of Appeals is reproduced in the Appendix, at A-33. The unreported Judgment of the District Court is reproduced in the Appendix, at A-35.

STATEMENT OF JURISDICTION

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. §1254(1), in that this Petition seeks review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a judgment upon jury verdict in favor of the Petitioner rendered by the United State District Court for the Western District of Texas, Waco Division.

This Petition is filed for the dual purposes of securing uniformity of decisions between Circuit Courts of Appeal and to raise a question of importance that significantly affects the case at hand and which is of grave public interest in the area of employment law.

STATUTES INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act of 1967 are found at 29 U.S.C. §623(d), and are set forth below:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment...because such individual...has opposed any practice made unlawful by this section, or because such individual...has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

The pertinent provisions of the Title VII of the Civil Rights Act of 1964 are found at 42 U.S.C. §2000e-3(a), and are set forth below:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

In June, 1985, FRANK HOLT began his employment with JTM INDUSTRIES, INC. ("JTM"). For the next eight years, Mr. Holt maintained bottom-line responsibility and management over JTM's Limestone facility.

JTM is a waste disposal corporation, concentrating on the disposal and sale of ash and other byproducts generated by public utilities. JTM's Limestone facility, is the largest of JTM's operations in volume and revenue. At the Limestone facility, JTM operates an onsite landfill owned by Houston Lighting & Power ("HL&P"). The 294-acre landfill is part of a power plant in Limestone County, Texas, where HL&P burns approximately 7 million tons of lignite coal per year, and generates approximately 2 million tons of ash per year.

Prior to the termination of his employment in 1993, Mr. Holt spent eight years managing the Limestone facility. At the time of his hire in 1985, Mr. Holt had thirty years of experience in earth moving operations. The late Bart Thomas, former President of JTM, and the man responsible for hiring Mr. Holt, testified that Mr. Holt was hired because he was one of the best "dirt men" in the country. Specifically, FRANK HOLT had a unique ability to move large volumes of soil or ash in a cost-efficient manner. Accordingly, high expectations were placed on Mr. Holt when he accepted the job, and he did not disappoint. Under Mr. Holt's management, the Limestone facility was the most profitable of all JTM operations. Under Mr. Holt's management, the facility never received a citation for environmental violations. Under Mr. Holt's management, the Limestone facility became JTM's "showcase", and prospective clients were brought to the plant to see the type and quality of service that JTM was

capable of providing. During his eight years with the company, Mr. Holt received numerous outstanding service awards, letters of commendation, and bonuses. Mr. Holt's annual performance evaluations never reflected an unsatisfactory rating.

Frank Holt's wife, Linda Holt was employed as office manager at JTM's Limestone Plant. Prior to May, 1993, Mrs. Holt was terminated from her position as a result of a newly enacted nepotism policy which prohibited her employment at a location where her husband was manager. At the time, JTM had an opening for an office manager at a neighboring location. Mrs. Holt applied for the position but was not hired. A younger, less experienced female was hired. On May 10, 1993, Mrs. Holt filed a complaint of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Texas Commission on Human Rights ("TCHR") complaining that the Company had discriminated against her because of her age. On May 21, 1993, a notice of the administrative complaint was served on Mr. Holt, for JTM, at the Limestone facility. He contacted JTM's Director of Human Resources and at her request, the administrative complaint was sent via Federal Express to JTM's corporate offices in Kennesaw, Georgia.

Two weeks later, on June 7, 1993, JTM regional manager, Chuck Anderson, advised Mr. Holt that he was being placed on administrative leave for two weeks while the company

investigated allegations of misconduct. Mr. Holt was instructed to leave the facility immediately and was forbidden to talk to any employees. Over the next two weeks, no one from JTM contacted Mr. Holt or attempted to conduct any type of investigation. Furthermore, despite JTM's claims that Mr. Holt was placed on leave because of alleged concerns regarding disclosure of confidential information, no one from JTM ever contacted the individual to whom the information was allegedly being disclosed. Two and a half weeks later, Mr. Holt received a message that Bill Fletcher, president of JTM, wanted to meet with him the next morning.

Despite the fact that no investigation was undertaken while Mr. Holt was on leave, Mr. Holt was told that the president of the Company had lost confidence in his ability, and Mr. Holt was being removed from his position as plant manager of the Limestone plant. At the meeting, Mr. Holt received no specific facts supporting any allegations relating to his conduct or management of the facility. During the trial, JTM attempted to prove that Mr. Holt was guilty of varying degrees of egregious conduct, including the disclosure of confidential information, disloyalty to the company, poor management, poor maintenance of the equipment, failure to train personnel, and ineffective communication. However, the company did not fire Mr. Holt. Rather, they removed him from his position as plant manager and reassigned him to a new position within the company. The new position required a lesser degree of

responsibility and would require the 63-year old Mr. Holt to spend almost all his time traveling around the country to different facilities. Mr. Holt requested and was assured that he would be allowed to work out of Texas, because of the costs and difficulties in relocating his family to Atlanta.

Later, Mr. Holt was advised that, despite JTM's previous representations to the contrary, he would be required to report to the Atlanta office and work out of the Atlanta office, beginning the following week. Mr. Holt made JTM aware that he believed the new position required him to travel too much, and accordingly, he was requesting reinstatement to his previous position at the Limestone facility. After an exchange of correspondence between Mr. Holt and JTM, Mr. Holt's employment with JTM was terminated, effective August 13, 1993.

In December 1993, Frank Holt and his wife, Linda Holt, filed a Complaint in the United States District Court for the Western District of Texas under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* ("ADEA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) ("Title VII") against JTM and its parent corporation USPCI alleging, *inter alia*, claims of age and sex discrimination as to Linda Holt and age discrimination and retaliation as to Frank Holt. Trial was convened before a jury on November 28, 1994 and lasted four days. At the conclusion of Plaintiff's case in chief, Defendants' motion

for judgment as a matter of law was denied. After all parties rested, Defendants again moved for judgment. Defendant USPCI's motion was granted on the basis that Plaintiffs were not shown to be employees of USPCI. Defendant JTM's motion for judgment was denied.

On December 1, 1994, the jury returned its verdict finding that Frank Holt was removed from his position as plant manager in retaliation for his wife's filing of an age discrimination claim against JTM. The jury found that the retaliatory acts of JTM were willful and that Frank Holt suffered actual damages in the amount of $100,000.00. The jury further found against Linda Holt on her claim of age discrimination. On February 1, 1995, after overruling JTM's post verdict motions, the District Court entered judgment in conformity with the jury verdict, awarding $200,000 in damages, plus attorney's fees, and ordering Mr. Holt's reinstatement.

JTM filed its notice of appeal and appealed to the United States Court of Appeals for the Fifth Circuit. On August 7, 1996, after having received oral argument, the Court of Appeals, with a dissenting opinion, reversed the District Court and entered judgment dismissing the case based upon the Court's determination that Plaintiff, Frank Holt, lacked standing. On December 13, 1996, the Court of Appeals entered an Order denying both the Petition for Rehearing and the Suggestion for Rehearing En Banc. Petitioner requests that the judgment of the Court of

Appeals be reversed and the judgment of the trial court be affirmed.

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ in order to resolve a split between the Federal Circuit Courts of Appeal on an important question regarding employer liability for retaliation against a third party for the protected activity of a co-employee.

The decision by the United States Court of Appeals for the Fifth Circuit in this case conflicts with all published authority from the other Federal Courts of Appeal, the Federal District Courts, and the Equal Employment Opportunity Commission, the administrative agency charged with enforcement of Title VII and the ADEA.

In each of the following cases, the Courts held that the plaintiffs had a cause of action, where they suffered an adverse employment action in retaliation for a spouse, close relative, or associate having engaged in protected activity: *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir. 1993) (Plaintiff retaliated against as a result of representative's complaint of race discrimination.); *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir. 1989) (Husband retaliated against as a result of wife's protected complaint.); *Thurman v. Robertshaw Control Co.,* 869 F.Supp. 934 (N.D.Ga. 1994) (Husband claims retaliatory discharge as a result of wife's

protected activity.); *Mandia v. ARCO Chemical Co.*, 618 F.Supp. 1248, 1250 (W.D.Pa. 1985) (Husband retaliated against as a result of wife's filing EEOC complaint for sex harassment.); *Clark v. R. J. Reynolds Tobacco Co.*, 27 FEP Cases 1628, 1982 WL 2277 (E.D.La. 1982) (A *prima facia* case under Title VII is established if it is alleged that the charging party "was statutorily protected from retaliation by the Defendant by being the relative of an employee who has engaged in statutorily protected activity".); *DeMedina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C. 1978) (Wife retaliated against as a result of protected activities of husband.); *United States v. City of Socorro*, 25 FEP 815, 1976 WL 523 (D.N.M. 1976) (Act was violated when husband was threatened because his wife was engaging in protected activities.); *Kombluh v. Stearns and Foster Co.*, 73 F.R.D. 307 (N.D. Ohio 1976) (Plaintiff was entitled to be heard on issue of retaliatory discharge because of his wife's lawful engagement in picketing the employer.). *See also Simmons v. Lyons*, 746 F.2d 265, 270-71 n.7 (5th Cir. 1984), (Where mother claims she was retaliated against as a result of alleged complaints of sex discrimination filed by daughter employed by the same employer, Fifth Circuit discusses the issue of third-party reprisals, but does not suggest that plaintiff failed to state a claim.).

The Fifth Circuit implemented a narrow and literal interpretation of the anti-retaliation provisions of the ADEA and Title VII, in direct contravention of prior holdings of the Federal Circuit Courts of Appeals and the Supreme

Court. *Robinson v. Shell Oil Co.,* 1997 WL 63007, p. 4-5 (US Feb. 19, 1997); *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 US 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *EEOC v. Ohio Edison Co.,* 7 F.3d at 544.

The decision by the United States Court of Appeals for the Fifth Circuit would allow an employer to deter an individual from exercising his rights under Title VII or the ADEA, by utilizing retaliation against a spouse or other family member who was also an employee of the company. The Fifth Circuit's opinion ignores the reality that the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA and Title VII. The Court's holding thus permits the very conduct that the anti-retaliation provisions are designed to prevent. Such an interpretation of the anti-retaliation provisions would produce absurd and unjust results. *DeMedina,* at 580.

This result precludes victims of retaliation from pursuing claims available to them, and it is violative of the principle that Title VII and the ADEA should be liberally interpreted to carry out Congressional intent. *Albemarle Paper Co. v. Moody,* 422 US 405, 417-19 (1975). This result can not be allowed to stand.

WHETHER THE ADEA AND TITLE VII PROHIBIT AN EMPLOYER FROM RETALIATING AGAINST A THIRD PARTY FOR THE PROTECTED ACTIVITY OF AN EMPLOYEE?

HAS PETITIONER STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER THE ADEA AND TITLE VII WHERE HE AND HIS WIFE WORK FOR THE SAME EMPLOYER AND HE IS RETALIATED AGAINST AS A RESULT OF HIS WIFE'S FILING OF AN ADMINISTRATIVE COMPLAINT OF EMPLOYMENT DISCRIMINATION, AS WAS FOUND BY THE JURY IN THIS CASE?

Contrary to Rulings of Other Courts. The majority holding of the Court of Appeals that Frank Holt lacked standing to sue for third-party retaliation under the anti-retaliation provision of the ADEA and Title VII, is without precedent[1]. All of the cases which have considered the issue of third party retaliations have concluded that the

---

[1]The anti-retaliation provisions of the ADEA are substantially identical to the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)-3(a). Cases interpreting the later provision are frequently relied upon in interpreting the former. See *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 n5 (5th Cir. 1992).

Plaintiffs have stated a claim upon which relief may be granted or, stated otherwise, have a cause of action.[2]

The following Courts have held contrary to the Fifth Circuits's holding in the case at hand, and have concluded that plaintiffs have a cause of action where they suffer an adverse employment action in retaliation for their spouse, close relative or associates having engaged in protected activity under Title VII or similar employment anti-retaliation statutes: *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir. 1993) (Plaintiff retaliated against as a result of representative's complaint of race discrimination.); *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir. 1989) (Husband retaliated against as a result of wife's protected complaint.); *Thurman v. Robertshaw Control Co.,* 869 F.Supp. 934 (N.D.Ga. 1994) (Holding "In a case of alleged retaliation for participation in a protected activity by a close relative who is a co-employee, the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in a statutorily protected expression."); *Mandia v. ARCO Chemical Co.,* 618 F.Supp. 1248, 1250

---

[2]Though the Fifth Circuit addressed the issue in terms of "standing", most courts, in considering third party reprisal claims have analyzed the issue in terms of whether the Plaintiff has stated a claim upon which relief can be granted. This portion of the Petition addresses third party reprisals with respect to whether Petitioner has a cause of action. However, because the Fifth Circuit addressed the issue in terms of standing, Petitioner addresses the standing issue separately, below.

(W.D.Pa. 1985) (Husband retaliated against as a result of wife's filing EEOC complaint for sex harassment.); *Clark v. R. J. Reynolds Tobacco Co.,* 27 FEP Cases 1628, 1982 WL 2277 (E.D.La. 1982) (A *prima facia* case under Title VII is established if it is alleged that the charging party "was statutorily protected from retaliation by the Defendant by being the relative of an employee who has engaged in statutorily protected activity".); *DeMedina v. Reinhardt,* 444 F.Supp. 573, 580 (D.D.C. 1978) (Wife retaliated against as a result of protected activities of husband.); *United States v. City of Socorro,* 25 FEP 815, 1976 WL 523 (D.N.M. 1976) (Act was violated when husband was threatened because his wife was engaging in protected activities.); *Kombluh v. Stearns and Foster Co.,* 73 F.R.D. 307 (N.D. Ohio 1976) (Plaintiff was entitled to be heard on issue of retaliatory discharge because of his wife's lawful engagement in picketing the employer.). *See also Simmons v. Lyons,* 746 F.2d 265, 270-71 n.7 (5th Cir. 1984), (Where mother claims she was retaliated against as a result of alleged complaints of sex discrimination filed by daughter employed by the same employer, Fifth Circuit discusses the issue of third-party reprisals, but does not suggest that plaintiff failed to state a claim.); *Cairo v. OH Material Corp.,* 710 F.Supp. 1069, 1072 n.12 (M.D.La. 1989).

As was noted by the Court in *DeMedina*:

> Congress unmistakably intended to insure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation. Since tolerance of third party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude... that Section 2000e-3 proscribes the alleged retaliation of which plaintiff complains.

DeMedina, 444 F.Supp. at 580.

The Seventh Circuit has recently ruled that Title VII permits a Plaintiff to assert a cause of action for retaliation where he failed to prevent third parties from engaging in protected conduct. *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir. 1996). The *McDonnell* Court held **"generally one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment."** *Id.*

Additionally, EEOC regulations and interpretations have concluded that the anti-retaliation provisions protect a third party from retaliation, when the third-party is closely related to a person exercising his/her statutory rights. 2 EEOC Compliance Manual §614, at 614.0001, 614.0008-.0009 (Apr. 1988). The EEOC has specifically held that it has

jurisdiction to investigate a claim that the charging party had been discharged in retaliation for his wife's filing a charge of discrimination against the employer. EEOC Decisions Dec. 77-34 (August 16, 1977)(CCH EEOC Dec. ¶6581).[3]

The Fifth Circuit's narrow interpretation of the anti-retaliation provisions "would produce absurd and unjust results." *DeMedina,* 444 F.Supp. at 580. Specifically, the decision would allow an employer to deter an individual from exercising his rights under Title VII or the ADEA, by utilizing retaliation against a spouse or other family member who was also an employee of the company. The Fifth Circuit's opinion ignores the reality that the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA and Title VII. The Court's holding thus permits the very conduct that the anti-retaliation provisions are designed to prevent. Furthermore, the Fifth Circuit's interpretation conflicts with all known precedent and should be reversed.

---

[3]The interpretation of a statute by the administrative agency charged with its enforcement is entitled to great deference by the Court. *Albemarle Paper Co. v. Moody,* 422 US 405, 431; 45 L.Ed 2d 280, 304; 95 S.Ct. 2362 (1975); *Griggs v. Duke Power Co.,* 401 US 424, 433-434, 28 L.Ed 2d 158, 165; 91 S.Ct. 849 (1971).

Narrow and restrictive interpretation. In concluding that Mr. Holt lacked standing to bring suit for retaliation under the ADEA, the Fifth Circuit utilized a narrow, literal interpretation of the statute. However, a rigid, literal interpretation of the anti-retaliation provisions should not be employed to undermine clear Congressional intent. *Bob Jones University v. United States,* 461 U.S. 574, 585, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.")

Additionally, Title VII and the ADEA should be accorded a liberal interpretation in order to effectuate the purpose of Congress. *Robinson v. Shell Oil Co.,* 1997 WL 63007, p. 4-5 (US Feb. 19, 1997); *MacDonald v. Eastern Wyoming Mental Health Center,* 941 F.2d 1115, 1118 (10th Cir. 1991); *Kale v. Combined Ins. Co.,* 861 F.2d 746, 751 (1st Cir. 1988); *Rabzak v. County of Berks,* 815 F.2d 17, 20 (3rd Cir. 1987); *Hamilton v. Rodgers,* 791 F.2d 439, 442 (5th Cir. 1986); *Rogers v. Equal Employment Opportunity Commission,* 454 F.2d 234, 238 (5th Cir. 1971).

The rule of broad construction of the ADEA and Title VII as well as other anti-discrimination statutes such as the Fair Labor Standards Act, the Fair Housing Act and the National Labor Relations Act is universal. Specifically, with respect to the anti-retaliation provisions at issue in

this case, the Courts have previously recognized that it is appropriate to reach beyond a narrow literal reading of the provisions in order to carry out Congressional intent. *Robinson v. Shell Oil Co.* (Holding that the term "employee" in anti-retaliation provision includes former employees.); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 US 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *EEOC v. Ohio Edison Co.*, 7 F.3d at 544 ("Courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear intent."); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (Holding that though a liberal reading of the anti-retaliation provisions of the ADEA would apply only to "employees or applicants for employment", the term "employee" must be interpreted broadly to include former employees.); *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1140-41 (5th Cir. 1981) (Court concludes that in order "to effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise," Court interprets the term "unlawful employment practice" to include a Plaintiff's **reasonable belief** that the employer was engaged in unlawful employment practices. *See also Id.*, at 1147 (Coleman, J., dissenting).).

The Fifth Circuit's holding in the instant case, resulting from a narrow and literal construction of Title VII and the ADEA, flies in the face of universal authority from

the Federal Courts of Appeal and the Supreme Court for a broad interpretation.

DOES A HUSBAND HAVE STANDING TO ASSERT A CAUSE OF ACTION FOR RETALIATION, UNDER THE ADEA AND TITLE VII WHERE THE HUSBAND AND WIFE WORK FOR THE SAME EMPLOYER, AND THE HUSBAND IS RETALIATED AGAINST AS A RESULT OF HIS WIFE'S FILING OF AN ADMINISTRATIVE COMPLAINT OF EMPLOYMENT DISCRIMINATION, AS WAS FOUND BY THE JURY IN THIS CASE?

The Fifth Circuit held Petitioner lacked standing to assert a cause of action for retaliation under the ADEA. However, the Court's opinion fails to distinguish between standing and the relative merit of Plaintiff's cause of action. The determination of standing should not depend on the merits of Plaintiff's contention that particular conduct is illegal. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343, 355 (1975). Rather, the issue "is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 20 L.Ed.2d 947, 950 (1968).

In determining whether the Plaintiff has standing under the requirements of Article III of the United States

Constitution, a Court must determine whether the Plaintiff has alleged (1) an actual or threatened injury that is (2) traceable to the conduct of the Defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). *See also Holt,* 89 F.3d at 1228 (Dennis, J., dissenting).

In addition to the minimum constitutional requirements, a Plaintiff must typically satisfy prudential considerations. *Warth,* 422 U.S. at 499, 95 S.Ct. at 2205, 45 L.Ed.2d at 355. However, Section 7(c) of the ADEA states "Any person aggrieved may bring a civil action" seeking relief. 29 U.S.C. §626(c)(1). This language has been interpreted to indicate Congressional intent to afford standing to the full limits permitted under Article III. *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). Accordingly, a Plaintiff satisfying the Article III requirements has standing to assert a cause of action under the ADEA. *Horne v. Firemen's Retirement System of St. Louis,* 69 F.3d 233, 235 (8th Cir. 1995).

In the instant case, Frank Holt suffered injury as a result of an adverse employment action traceable to the conduct of Defendant, and his injury was capable of being redressed by a favorable jury verdict. Accordingly, Mr. Holt satisfies the requirements of Article III and, therefore, it was error for the Court to conclude that he lacks standing.

The majority opinion of the Court of Appeals was concerned in large part with having to define what relationships in the future would grant standing for claims of retaliation. *Holt*, 89 F.3d at 1227. However, as pointed out in the dissenting opinion, "The ultimate focus in a retaliation claim such as this is not upon whether a particular relationship existed between the victim of retaliation and the individual who is engaged in protected conduct; rather, the crucial issue is whether there is a **causal connection** between the employer's adverse employment action against the victim and the protected conduct engaged in by the relative or friend." *Id.*, 89 F.3d at 1232 (Dennis, J., dissenting) (emphasis added). The majority's concern is minimal, because a plaintiff asserting a cause of action for retaliation must still make out a *prima facie* case of retaliation. Accordingly, the role of the Courts is not to attempt to define by general rule what relationships will give rise to a cause of action, but rather to focus on the facts of each case, and to make a fact intensive determination as to whether this particular plaintiff is able to show that the adverse employment actions taken against him were in retaliation for protected conduct engaged in by another. Obviously, the closer the relationship between the victim and the individual who is engaged in the protected conduct, the easier it will be for a plaintiff to demonstrate a causal connection and *prima facie* case.

In this case, the jury heard all the evidence and concluded that, in fact, JTM had retaliated against Mr.

Holt. By focusing on the evidence presented in the individual case, as opposed to defining sufficient relationship between the parties, the burden will continue to rest with the plaintiff to prove he was actually retaliated against. *Mandia v. ARCO Chemical, supra; Thurman v. Robertshaw Control Co., supra; EEOC v. Ohio Edison Co., supra.*

CONCLUSION

Frank Holt proved to the satisfaction of a jury that he was removed from his position of plant manager in retaliation for his wife's protected ADEA activity. As determined by the trial judge, there was more than ample evidence to support the jury verdict. The majority opinion of the Fifth Circuit, denying relief on the basis that Mr. Holt lacks standing, is incorrect for three reasons. First, it is contrary to all existing precedent. Second, it is based upon a narrow, literal interpretation of the ADEA and Title VII which all Courts, including the Supreme Court, have rejected. Finally, it fails to recognize the proper definition of "standing" as clearly articulated by the Supreme Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

John Patrick Atkins
Counsel of Record
Philip E. McCleery
SHEEHY, LOVELACE &
MAYFIELD, P.C.
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710
(817) 772-8022
FAX: (817) 772-9297

ATTORNEYS FOR PETITIONER

Supreme Court, U.S.
FILED
961472 MAR 13 1997
OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRANK HOLT
Plaintiff-Petitioner

vs.

JTM INDUSTRIES, INC.
Defendant-Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Fifth Circuit (CASE NO. 95-50145)

John Patrick Atkins
Counsel of Record
Philip E. McCleery
SHEEHY, LOVELACE & MAYFIELD, P.C.
510 N. Valley Mills Dr., Suite 500
Waco, Texas 76710
(817) 772-8022
FAX (817) 772-9297
Attorneys for Petitioner

40 pp

Frank HOLT; Linda Holt,
Plaintiffs-Appellees,
v.

JTM INDUSTRIES, INC.,
Defendant-Appellant,

and

USPCI Inc., Defendant.
No. 95-50145.

United States Court of Appeals,
Fifth Circuit.

Aug. 7, 1996.

Appeal from the United States District Court for the Western District of Texas.

Before GARWOOD, EMILIO M. GARZA and DENNIS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendant JTM Industries, Inc. ("JTM") appeals from the district court's denial of its motion for judgment as a matter of law. We reverse and dismiss the case with prejudice.

I

Plaintiffs Linda and Frank Holt were employees at JTM's Limestone Facility ("Facility") in Jewett, Texas. After JTM terminated Linda, she filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Texas Commission on Human Rights ("TCHR"). Approximately two weeks after JTM received notice of Linda's administrative complaint, Frank was placed on paid administrative leave. Frank was subsequently offered another job with JTM in Atlanta which he accepted, but then voluntarily quit after several weeks.

Linda and Frank Holt filed a complaint against JTM and its parent corporation, USPCI, alleging, *inter alia*, violations of their rights under the Age Discrimination in Employment Act of 1967 ("ADEA"). Specifically, the Holts' alleged age discrimination, pursuant to 29 U.S.C. § 621, and retaliation against Frank for Linda's administrative complaint of age discrimination, pursuant to 29 U.S.C. § 623(d). The claims that survived summary judgment were tried before a jury. At the close of evidence, the district court refused to submit any of the Holts' claims against USPCI to the jury, denied JTM's motion for judgment as

a matter of law, and submitted the Holts' claims against JTM to the jury. The jury rejected all of the Holts' claims against JTM, except for Frank's claim of retaliation. The district court entered judgment in conformity with the jury verdict, implicitly denying JTM's third motion for judgment as a matter of law. JTM filed a timely notice of appeal.

II

[1-3] JTM argues that the district court erred in denying its motion for judgment as a matter of law. We review a district court's disposition of a motion for judgment as a matter of law *de novo*. *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1375 (5th Cir. 1996). We must consider all of the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). There must be a conflict of substantial evidence to create a jury question. *Id.* at 375.

[4,5] Section 623(d) of the ADEA protects employees from retaliation for opposing acts of age discrimination, or for charging, testifying, assisting, or participating in any manner in an investigation, proceeding, or litigation under the ADEA. 29 U.S.C. § 623(d). A plaintiff establishes a prima facie case of retaliation under the ADEA by showing: (1) that he engaged in activity protected by the ADEA; (2) that there was an adverse employment action; and (3) that there was a causal connection between the

participation in the protected activity and the adverse employment decision. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992).

JTM alleges that the district court erred in denying its motion for judgment as a matter of law because Frank did not engage in an activity that is protected by the ADEA. Specifically, JTM argues that Frank did not oppose JTM's practices which Linda alleged were discriminatory, nor did he make a charge, testify, assist or participate in any manner in Linda's age discrimination complaint, as required under 29 U.S.C. § 623(d). The Holts do not argue that Frank participated in Linda's filing a charge of age discrimination. Instead, they argue that Linda's charge of age discrimination, which is protected activity under the ADEA, should be imputed to her husband Frank.

[6,7] The plain language of § 623(d) prohibits an employer from retaliating against an employee because "such individual" has opposed a practice prohibited by the ADEA or has participated "in any manner" in a proceeding under the ADEA. This section permits third parties to sue under § 623(d) if they have engaged in the enumerated conduct, even if the conduct was on behalf of another employee's claim of discrimination. *See Jones v. Flagship Intern.*, 793 F.2d 714, 727 (5th Cir. 1986) (acknowledging that "employee opposition to discriminatory employment practices directed against a fellow employee may constitute" protected activity under the anti-retaliation provision of

Title VII), *cert. denied,* 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987); *Mandia v. ARCO Chemical Co.,* 618 F.Supp. 1248, 1250 (W.D.Pa. 1985) (holding that husband could sue under the anti-retaliation provision of Title VII because he "participated, supported and aided his wife in filing" EEOC charges of sexual harassment).[1] The Holts urge an even broader interpretation of § 623(d). They argue that an individual suing for retaliation need not personally engage in any of the enumerated conduct in § 623(d). Instead, the Holts contend that once an employee's spouse engages in protected activity, the non-complaining spouse automatically has standing to sue for retaliation under § 623(d). This interpretation is necessary, according to the Holts, to eliminate the risk that an employer will discriminate against a complaining employee's spouse in retaliation for the complaining employee's protected activities.

The Holts cite *De Medina v. Reinhardt*, 444 F.Supp. 573 (D.D.C. 1978), as support for their position. The plaintiff in *De Medina* sued under the anti-retaliation provision of Title VII for retaliation against her because of her husband's anti-discrimination activities. *De Medina,* 444 F.Supp. at 574. The district court concluded that "tolerance of third-party reprisals would, no less than tolerance of

---

[1] The anti-retaliation provisions of the ADEA and Title VII are similar and "cases interpreting the latter provision are frequently relied upon in interpreting the former." *Shirley,* 970 F.2d at 42 n. 5.

direct reprisals, deter persons from exercising their protected rights under Title VII," which would be contrary to legislative intent. *Id.* at 580. Therefore, the court held that a plaintiff could sue for retaliation for a relative's or friend's protected activities. It is unclear from the district court's statement of facts whether the plaintiff participated in any manner in her husband's activities. To the extent that this case stands for the proposition that a plaintiff automatically has standing to sue for retaliation when a relative or friend engages in protected activity, we disagree.

[8] Such a rule of automatic standing might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities. However, we conclude that such a rule would contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation. Section 623(d) prohibits retaliation against an employee who has opposed a discriminatory practice or has participated "in any manner" in a proceeding under the ADEA. This broad language is consistent with Congress's remedial goals in enacting the ADEA. Congress intended the anti-retaliation provision of the ADEA to enable employees to engage in protected activities without fear of economic retaliation. *See E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993) (stating that the purpose of the ADEA "is to prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions'") (alteration in original) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S.

288, 292, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960)). To accomplish this goal, Congress drafted § 623(d) to give those employees who oppose discriminatory practices or who participate "in any manner in an investigation [or] proceeding" under the ADEA automatic standing to sue if their employers retaliate against them for their actions.

[9] We recognize that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions. However, we believe that the language that Congress has employed in § 623(d) will better protect employees against retaliation than we could by trying to define the types of relationships that should render automatic standing under § 623(d). If we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation? In most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination. The plain language of § 623(d) will protect these employees from retaliation for their protected activities. However, when an individual, spouse or otherwise, has not participated "*in any manner*" in conduct that is protected by the ADEA, we hold that he does not have automatic

standing to sue for retaliation under § 623(d) simply because his spouse has engaged in protected activity.[2]

The evidence at trial revealed that Frank was not aware of Linda's intent to file a charge of age discrimination against JTM until a few days before she actually made the charge. He testified that when TCHR mailed Linda a copy of the notice of the filing and service of her complaint, he retrieved it from the post office and looked at it with her. Frank's only other involvement with Linda's protected activities involved carrying out his duties as an employee. The TCHR served the notice of Linda's complaint on JTM to Frank's attention as Plant Manager. Frank testified that he never opened the notice, but he assumed that it contained Linda's complaint. After receiving the notice,

---

[2] The only other circuit case that has addressed a similar issue is not inconsistent with our interpretation of § 623(d). Interpreting the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), the Sixth Circuit held that an employee is protected from retaliation where the employee's representative opposes a discriminatory practice. *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir.1993). The plaintiff in *Ohio Edison* alleged that his employer had discriminated against him by withdrawing an offer of reinstatement "because a co-employee engaged in protected activity and protested [the plaintiff's] discriminatory discharge *on his behalf* and threatened that a claim would be filed for the discriminatory discharge." *Id.* at 546 (emphasis added). The fact that the employee had engaged a "representative" to act on his behalf to protest his discharge illustrates that the employee had opposed a discriminatory employment practice, as required under the anti-retaliation provision of Title VII. Therefore, unlike Frank Holt, the plaintiff in *Ohio Edison* fell within the plain meaning of the statute as one who has standing to sue for retaliation.

Frank called the Manager of Human Resources for JTM, Debbie Bankston, and told her that JTM had been served with papers from the TCHR. Frank testified that he followed Ms. Bankston's orders and sent the notice via Federal Express to JTM's Human Resources Department.

This evidence does not establish that Frank participated in Linda's protected activities or that he opposed JTM's alleged discriminatory practice. There is no evidence that Frank helped Linda prepare her charge or that he assisted in any way in its filing. At best, Frank was a passive observer of Linda's protected activities. As such, he does not have standing to sue for retaliation under § 623(d).

III

For the foregoing reasons, we REVERSE the judgment of the district court and DISMISS the case with prejudice.

DENNIS, Circuit Judge, dissenting:

Frank Holt proved to the satisfaction of a jury that his employer engaged in adverse employment actions against him in retaliation for his wife's filing of a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Nonetheless, the majority holds that Mr. Holt lacks "standing" to sue under that Act's anti-retaliation provision because he did not prove that he personally

engaged in the protected conduct giving rise to the employer's wrongful action. Because the majority relies on the concept of standing as the basis of its reversal, when at best it has presented an argument that Mr. Holt has no cause of action under the statute; because the decision imposes a rigid literalism in its interpretation of the anti-retaliation provision that undermines the purpose of the statute; and because the opinion ignores relevant case law and agency decisions construing the similar anti-retaliation provision of Title VII to provide a cause of action for retaliation against an employee for the protected activity of that employee's family member, I dissent.

The question of standing "[i]n essence... is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdictional and prudential limitations on its exercise." *Warth v Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The constitutional dimension of standing "imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Id.*, 422 U.S. at 498, 95 S.Ct. at 2205. The Supreme Court has formulated a three-part test to determine whether the plaintiff has standing for purposes of Article III, requiring the plaintiff to allege (1) an actual or threatened injury that is (2) traceable to the conduct of the defendant and (3) is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife,*

504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *see 6A Moore's Federal Practice* § 57.11[2.-1], at 57-89. Because the requirement of injury is part of the Article III constitutional test for standing, Congress may not authorize suit in the absence of an injury. *Lujan, supra*. However, as the *Lujan* Court noted, Congress is empowered to create substantive rights and to authorize suit for their enforcement and consequently may define an injury in a way that provides the basis for standing even in the absence of other injury to the plaintiff. *See, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373, 102 S.Ct. 1114, 1121, 71 L.Ed. 2d 214 (1982).

In addition to the minimum constitutional requirements, the Court has recognized other limits on the class of persons who may invoke the federal judicial power. *Warth*, 422 U.S., at 499, 95 S.Ct., at 2205. These prudential considerations are self-imposed judicial limits on the exercise of federal jurisdiction and include the following requirements: (1) that a litigant generally assert his own and not another's interests; (2) that the federal courts not adjudicate mere generalized grievances that are more appropriately addressed by the representative branches of government; and (3) that the plaintiffs alleged injury arguably fall within the "zone of interests' protected by the law invoked. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed. 2d 556 (1984); *Warth,* 422 U.S. at 499-500, 95 S.Ct. at 2205. Although Congress may not remove the Article III requirement that the plaintiff allege a distinct and palpable

injury to himself, it can grant standing to persons who meet Article III requirements even though they would otherwise be barred by prudential standing considerations. *Id.* at 501, 95 S.Ct. at 2206.

Section 7(c) of the ADEA provides that "*[a]ny person aggrieved* may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act..." 29 U.S.C. § 626(c)(1) (emphasis supplied). Through this language, Congress indicated its intent to afford standing to the full limits permitted under Article III. In *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209, 93 S.Ct.364, 367, 34 L.Ed.2d 415 (1972), the Supreme Court construed the term "aggrieved person" in § 810 of the Fair Housing Act, which the Act defined to include "[a]ny person who claims to have been injured by a discriminatory housing practice," 42 U.S.C. § 3610(a), to demonstrate a congressional intent to confer standing to the fullest extent permitted by Article III of the United States Constitution. In reaching this conclusion, the Court relied on the holding in *Hackett v. McGuire Bros.,* 445 F.2d 442 (3rd Cir. 1971), that the language of Title VII authorizing the filing of suits "by a person claiming to be aggrieved" shows "'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Trafficante,* 409 U.S., at 209, 93 S.Ct. at 367 (quoting *Hackett,* 445 F.2d at 446). This court, in turn, applied *Trafficante* to find that "the strong similarities between the language, design, and

purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in § 706 of Title VII must be construed in the same manner that *Trafficante* construed the term 'aggrieved person' in § 810 of the Fair Housing Act." *EEOC v. Mississippi College,* 626 F.2d 477, 482 (5th Cir. 1980) (citing *EEOC v. Bailey Co.,* 563 F.2d 439, 450-54 (6th Cir. 1977), *cert. denied,* 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 506 (1978); *Waters v. Heublein,* 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied,* 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977)), *cert. denied,* 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981). *See also Fair Employment Council v BMC Marketing Corp.,* 28 F.3d 1268, 1278 (D.C.Cir. 1994) (citing *Gray v. Greyhound Lines,* 545 F.2d 169, 176 (D.C.Cir. 1976)).

Following this line of reasoning, the pertinent language of the ADEA, "[a]ny person aggrieved may bring a civil action," 29 U.S.C. § 626(c)(1), similarly indicates that Congress intended to provide standing under the Act to the fullest extent available under Article III. *See Horne v. Firemen's Retirement System of St. Louis,* 69 F.3d 233, 235 (8th Cir.1995) (plaintiff satisfying Article III requirements has standing under the ADEA); *Barchers v. Union Pacific Railroad Co.,* 765 F.Supp. 595, 596-97 (W.D.Mo. 1991) (same). Accordingly, any "person aggrieved" is required by the ADEA to meet only the minimum constitutional standing requirements of Article III. Mr. Holt clearly satisfies these minimal standing requirements

for he alleged (1) that he was injured (2) as a result of the defendant's conduct and (3) a favorable decision granting him compensatory and/or injunctive relief is likely to redress his injuries.[3]

---

[3] Even if prudential standing considerations were factors, Mr. Holt has adequately established that he could clear these hurdles as well. He has sued to redress injuries he personally suffered as a result of the adverse employment actions his employer engaged in through its retaliation against him for Mrs. Holt's protected conduct, and thus cannot be said to be asserting the rights of others. Similarly, he does not present a "generalized grievance," as he complains of specific harm the employer directed at him. Although the majority does not undertake a standing analysis, its determination that Mr. Holt does not have standing because he did not prove involvement in his wife's protected activity appears best explained as a conclusion that Mr. Holt is not within the "zone of interests" protected by the ADEA. However, as the Supreme Court pointed out in *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 400 n. 16, 107 S.Ct. 750, 757 n. 16, 93 L.Ed.2d 757 (1987), the "zone of interest" test has primarily been applied in claims brought under the Administrative Procedure Act and "is most usefully understood as a gloss on the meaning of § 702 [of that Act].... While inquiries into reviewability or prudential standing in other contests may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application." Nonetheless, assuming its applicability here, Mr. Holt, as an employee within the meaning of the ADEA who has alleged injury to himself from his employer's retaliatory conduct in violation of the Act, clearly satisfies any requirement that he be arguably within the zone of interest of the ADEA. The "zone of interest" test only "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399, 107 S.Ct. at 757; *see also City of Milwaukee v. Block*, 823 F.2d 1158, 1165-66 (7th Cir.1987) (discussing *Clarke*'s clarification of test).

In finding that Mr. Holt lacks standing to sue, the majority has confused the concepts of standing and cause of action. As the Supreme Court explained in *Davis v. Passman,* 442 U.S. 228, 239 n. 18, 99 S.Ct. 2264, 2274 n.18,60 L.Ed.2d 846 (1979):

> [S]tanding is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction, *see Warth v. Seldin,* 442 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court....

In *Davis,* the Court determined that the appellate court had confused the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action. The Court observed that while "[t]he nature of petitioner's injury... is relevant to the determination of whether she has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions,'... [w]hether petitioner has asserted a cause of action... depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use

the courts to enforce the right at issue." *Id.* 442 U.S. at 241 n. 18, 99 S.Ct. at 2274 n. 18 (quoting *Baker v. Carr,* 369 U.S. at 204, 82 S.Ct. at 703).

The majority's conclusion that a victim of adverse employment actions conducted in retaliation for the protected activity of the victim's family member lacks standing to sue unless the victim alleges and proves actual involvement in the protected conduct is more appropriately viewed as a determination that a victim who suffers retaliatory actions for no reason other than his or her relationship to the person engaging in protected conduct is not a member of a class the ADEA is intended to protect and thus has no cause of action. This conclusion relics on a rigid, literal interpretation of the ADEA's anti-retaliation provision that undermines the broad purposes of the statute.

Congress enacted the ADEA in 1967 as part of an ongoing effort to eradicate discrimination in the workplace. *McKennon v. Nashville Banner Publishing Co.,* ____ U.S. __, __, 115 S.Ct. 879, 884, 130 L.Ed.2d 852 (1995) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Americans with Disability Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, the National Labor Relations Act, 29 U.S.C. § 158(a) and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)); *see Hodgson v. First Federal Savings and Loan Ass'n of Broward County, Fl.*, 455 F.2d 818, 820 (5th Cir. 1972). The ADEA, like most of these anti-

discrimination statutes, contemplates both agency and private action to enforce its provisions. See 29 U.S.C. § 626; *see, e.g.*, 42 U.S.C. § 2000e-5 (Title VII); 42 U.S.C. § 12117 (ADA). As a means of promoting its broad anti-discrimination goals, the Act prohibits an employer from engaging in adverse employment action in retaliation for its employee's protected conduct. *See* 29 U.S.C. 623(d); *see, e.g.*, 42 U.S.C. § 2000e-3 (Title VII); 42 U.S.C. § 12206 (ADA). Under the ADEA, federal courts have discretion to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." 29 U.S.C. § 626(b); *McKennon*, ____ U.S. at ___, 115 S.Ct. 884.

The anti-retaliation provisions of the ADEA and similar statutes clearly are intended to encourage the enforcement of rights protected under the statutes. As this court has observed in recognizing a claim for retaliation under 42 U.S.C. § 1981, "[w]ere we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further discrimination against those persons willing to risk their employer's vengeance by filing suits." *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1983). *See also EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987) (purpose of anti-retaliation provision of ADEA is "to protect persons who 'resort[] to the legal procedures that Congress has established in order to right congressionally recognized wrongs,' *East v. Romine, Inc.*,

518 F.2d 332, 340 (5th Cir. 1975)."); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1214 (2nd Cir. 1993) ("The purpose of the ADEA's anti-retaliation provision is to protect persons who initiate a suit to vindicate a right that Congress has recognized as a wrong."); *cf. Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S.288, 292, 80 S.Ct.332, 335, 4 L.Ed.2d 323 (1960) (observing in relation to anti-retaliation provision of Fair Labor Standards Act that "[b]y the proscription of retaliatory acts set forth in § 15(a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."); *Jones v. Flagship International*, 793 F.2d 714, 725 (5th Cir. 1986) (recognizing that the provisions of Title VII "must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices," and that "since the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of [Title VII's anti-retaliation provision] is required."), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987).

The jury in this case determined that the employer, JTM Industries, Inc. (JTM), had replaced Frank Holt as plant manager in retaliation for his wife's EEOC filing under the ADEA. The jury thus found a causal connection between Mrs. Holt's EEOC filing and the employer's replacement of Frank Holt. The majority's determination

that Mr. Holt nevertheless may not pursue a claim of retaliation because he did not demonstrate that he personally was engaged in protected conduct relies, as the majority admits, on a strict reading of the anti-retaliation provision of the ADEA. That provision, in pertinent part, provides:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment... because such individual... has opposed any practice made unlawful by this section, or because such individual... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

29 U.S.C. § 623(d).

The majority's reading of the provision flouts the clear purpose of the ADEA's prohibition of retaliatory conduct to ensure that claimants are secure to pursue their claims of discrimination. Under the majority's approach, in the instances when both an ADEA complainant and his or her relative work for the same employee, the anti-retaliation provision would not prevent the employer from taking adverse employment action against the family member, even though such action would be motivated by the relative's obvious connection to the complainant, thereby defeating a central purpose of the statute. The literal meaning of the anti-retaliation provision should be not

be used to undermine the clear purpose and intent of the ADEA. As the Supreme Court has observed:

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:
>
> > The general words used in the clause ... taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by an enlightened tribunal because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute ... and the objects and policy of the law.*
> >
> > ...

Bob Jones University v. United States, 461 U.S. 574, 585, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983) (quoting *Brown v. Duchesne,* 19 How. 183, 194, 15 L.Ed. 595 (1857)) (emphasis supplied in *Bob Jones*). *See also Almendarez v. Barrett-Fisher Co.,* 762 F.2d 1275, 1278 (5th Cir. 1985) ("literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose

clearly manifested in an entire statute or statutory scheme or with clear legislative history.").

The federal anti-discrimination laws are to be liberally construed to effectuate their remedial purposes. *See, e.g., MacDonald v. Eastern Wyoming Mental Health Center,* 941 F.2d 1115, 1118 (10th Cir. 1991) ("the ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination.") (quoting *Dartt v. Shell Oil Co.,*539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd* 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977)); *Kale v. Combined Ins. Co.,* 861 F.2d 746, 751 (1st Cir. 1988) (same); *Rabzak v. County of Berks,* 815 F.2d 17, 20 (3rd Cir. 1987) (same); *Hamilton v. Rodgers,* 791 F.2d 439, 442 (5th Cir.1986) ("Title VII should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.") (quoting *Rogers v. EEOC, 454* F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972)). This canon of construction holds true in the context of interpreting anti-retaliation provisions. As the Sixth Circuit observed in *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 545 (6th Cir. 1993):

> [C]ourts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in

proscribing. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the statute supports a non-exclusive reading of the. statutory language.

See also McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (eschewing a strict interpretation of Title VII's anti-retaliation provision to find that an employer violated that statute by retaliating against the plaintiff-supervisor for failing to prevent subordinates from filing complaints under the statute). In *McDonnell,* Judge Posner, writing for the court, acknowledged that the plaintiffs claim did not come with the literal terms of Title VII's anti-retaliatory provision, but explained:

> The reasons for this wording... so far as we are able to discover (there is no pertinent legislative history), is that in the ordinary case an employer would have no reason to retaliate against someone who did *not* file a compliant, testify, etc. Generally one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment. But that possibility is unlikely to have been in the forefront of congressional thinking when the retaliation provision was drafted.

Id. (emphasis original). In concluding that the plaintiff had a valid retaliation claim, the court observed that it does no great violence to the statutory language to correct Congress's oversight by construing the provision to recognize the plaintiffs claims.[4] *Id.*

The same holds true here. Situations in which spouses or other related parties work for the same employer do not occur with great frequency. The majority recognizes "a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions." Op. at 1227. Nonetheless, my colleagues deem the risk trivial compared to the potential harm of having courts "trying to define the types of relationships that should render automatic standing under § 623(d)." *Id.* at 1227. The majority's concerns about involving the courts in assessing what relationships give rise to "standing" are both overblown and misplaced --the ultimate focus in a retaliation claim such as this is not upon whether a particular relationship exists between the victim of retaliation and the individual who has engaged in protected conduct; rather, the crucial issue is whether there is a causal connection between the employer's adverse employment action against the victim

---

[4] The opinion additionally observed that the plaintiff's "passive opposition" to the employer's desire that he prevent his subordinates from filing discrimination complaints could be construed as "opposition" to an unlawful practice and "participation" in protected conduct plainly covered by the provision. *McDonnell*, 84 F.3d at 262.

and the protected conduct engaged in by the relative or friend. There is little reason to worry that a recognition of claims such as Mr. Holt's will overburden federal judges when in reality all that would be required is a simple modification of the *prima facie* case applied to establish retaliation: Instead of requiring the plaintiff to prove "(1) that he engaged in activity protected by the ADEA; (2) that an adverse employment action occurred; and (3) that a causal link between the participation in the protected activity and the adverse employment decision exists," *Ray v. Iuka Special Mun. Separate School Dist.*, 51 F.3d 1246, 1249 (5th Cir. 1995) (citing *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992), the plaintiff would have to show (1) that an employee engaged in activity protected by the ADEA; (2) that an adverse employment action occurred to the plaintiff; and (3) that a causal link between the participation in the protected activity and the adverse employment decision exists. In this case, the jury found that JTM replaced Frank Holt because his wife had filed an EEOC claim.[5] To condone such retaliation because it fails to fall squarely within the literal terms of the anti-

---

[5] The trial court's instructions on the retaliation claim were as follows:

As to Frank Holt's retaliation claim, he must prove the following elements by a preponderance of the evidence:

1. That his wife filed a charge of discrimination against Defendant;
2. That he was removed from the position of Manager; and
3. That there was a causal connection between his wife's filing a charge of discrimination and his removal as Manager.

retaliation provision, despite the ADEA's design to prohibit retaliation in order to promote the free exercise of rights protected under that Act, elevates form over substance and permits employers to evade the reach of the statute by making relatives or friends of complaining parties the "whipping boys" for the protected conduct of others.

Finally, the majority decision flies in the face of agency and federal court decisions that hold that the parallel anti-retaliation provision of Title VII prohibits the type of conduct in which JTM engaged here. Although the majority acknowledges that "the anti-retaliation provisions of the ADEA and Title VII are similar and 'cases interpreting the latter provision are frequently relied upon in interpreting the former.'" Op. at 1226, n. 1 (quoting *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 n. 5 (5th Cir. 1992)),[6] it ignores the overwhelming weight of decisions construing the anti-retaliation provision of Title VII to provide a cause of action where an employer retaliates against the plaintiff because of the protected conduct of a friend or relative.

---

[6] Record, Vol. XI, at 838.

The relevant provision of Title VII provides, in pertinent part:
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.
42 U.S.C. § 2000e-3(a).

As early as 1975, the EEOC recognized a violation of Title VII when an employer discharged a husband in retaliation for his wife's EEOC claim. EEOC Dec. No. 76-33 (Sept. 11, 1975), 1973-1983 CCH EEOC Dec. ¶ 6626. In a subsequent case, the agency specifically held that it had jurisdiction to investigate a claim that the charging party had been discharged in retaliation for his wife's filing a charge of discrimination against the employer. EEOC Dec. 77-34 (Aug. 16, 1977), 1973-1983 CCH EEOC Dec. ¶ 6581. The agency observed that while the language of Title VII's anti-retaliation provision does not directly determine the question of jurisdiction, "[t]he language does manifest a congressional intent to extend coverage over a broad base of activities," and acknowledged that "where it can be shown that an employer discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge." *Id.* Consequently, the agency concluded that "discrimination against an employee because he or she has a familial relationship with a person who has filed a charge of discrimination is violative of Section 704(a) of Title VII." *Id.*

Additionally, the agency has formally articulated its position on retaliation. Section 614 of its Interpretative Manual, in pertinent part, provides:

§ 614.1 *Introduction*

(A) *General*--Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, is intended to provide "exceptionally broad protection" for protestors of discriminatory employment practices. See *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-1005, 2 EPD § 10,011 (5th Cir. 1969). Section 4(d) of the ADEA is virtually identical to § 704(a) and provides the same protection.... (footnote omitted).

* * * * * *

§ 614.3 *Essential Elements of a Retaliation Violation*

* * * * * *

b) *Opposition or Participation*

* * * * * *

... [A]s to both opposition and participation, the retaliation provisions of Title VII and the ADEA also prohibit retaliation against someone so closely related to the person exercising his/her statutory rights that it would discourage or prevent the person from exercising those rights. *Clark v. R.J. Reynolds Tobacco Co.*, 28 EPD § 32,500, (E.D.La. 1982), 1982 WL 2277 (E.D.La.); *see*

also Commission Decision No. 76-33, CCH EEOC Decisions (1983) § 6626.

2 EEOC Compliance Manual § 614, at 614.0001 & 614.0008-614.0009 (Apr.1988).

Further, federal courts addressing this issue have uniformly concluded that an employer violates Title VII's anti-retaliation provision by taking adverse employment action against an employee because of the protected activity of a family member or friend. In *McKenzie v. Atlantic Richfield Co.,* 906 F.Supp. 572, 575 (D.Colo. 1995), the court concluded that the plaintiff-husband had a cause of action for his employer's adverse action against him in retaliation for his wife's protected activity, observing that "[a]s other courts have held... the antireprisal provision of Title VII precludes an employer from discriminating against an individual because that person's spouse has engaged in protected activity." *Id.* (citing *Wu v. Thomas,* 863 F.2d 1543 (11th Cir. 1989); *De Medina v. Reinhardt,* 444 F.Supp. 573 (D.D.C. 1978)). *See also Turman v. Robertshaw Control Co.,* 869 F.Supp. 934, 941 (N.D.Ga. 1994) (recognizing that "[i]n a case of an alleged retaliation for participation in a protected activity by a close relative who is a co-employee, the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in statutorily protected expression."); *Clark v. R.J. Reynolds Tobacco Co.,* Civ. No. 79-7, 1982 WL 2277, at *7 (E.D.La. Feb. 2, 1982) (finding *prima facie*

case where plaintiff received reprimand allegedly in retaliation for his son's EEOC filing); *De Medina v. Reinhardt,* 444 F.Supp. 573, 580 (D.D.C. 1978) (acknowledging that Title VII does not expressly consider the possibility of third-party reprisals, but concluding that "[s]ince third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude, as has the only other court to consider the issue, *Kornbluh v. Stearns & Foster Co.,* 73 F.R.D. 307, 312 (N.D. Ohio 1976), that section 2000e-3 proscribes the alleged retaliation of which plaintiff complains."). *Cf. McDonnell v. Cisneros,* 84 F.3d 255, 262 (7th Cir. 1996) (construing Title VII to permit suit by one complaining of retaliation either for being suspected of engaging in or for failing to prevent another from engaging in protected conduct); *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 545-46 (6th Cir. 1993) (broadly construing statutory language that "he has opposed any practice" to mean the plaintiff or his agent); *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir. 1989) (permitting husband's claim of retaliation against him for wife's EEOC filing to "piggy back" on wife's charge of retaliation).

The majority ignores the reality that the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA. The majority opinion thus permits the very conduct that the anti-retaliation provision is designed

to prevent. Because I do not believe that this narrow reading of the provision is justified, I dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50145

FRANK HOLT;	§
LINDA HOLT,	§
Plaintiffs-Appellees	§
	§
V.	§
	§
JTM INDUSTRIES, INC.,	§
Defendant-Appellant	§
and	§
USPCI, INC,	§
Defendants.	§

Appeal from the United States District Court for the
Western District of Texas, Waco

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 8/7/96, 5 Cir., F.3d)

(December 13, 1996)
Before GARWOOD, EMILIO M. GARZA,
and DENNIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES
41 FOR STAY OF THE MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50145

D. C. Docket No. W-93-CV-443

FRANK HOLT;	§
LINDA HOLT,	§
Plaintiffs-Appellees	§
	§
V.	§
	§
JTM INDUSTRIES, INC.,	§
Defendant-Appellant	§
and	§
USPCI, INC,	§
Defendants.	§

Appeal from the United States District Court for the Western District of Texas, Waco

Before GARWOOD, EMILIO M. GARZA, and DENNIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is reversed and the cause is dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the costs on appeal.

DENNIS, Circuit Judge, dissents:

ISSUED AS MANDATE: December 24, 1996.

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/_____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FRANK HOLT and	§	
LINDA HOLT,	§	
Plaintiffs,	§	
	§	
V.	§	CIVIL ACTION NO.
	§	W-93-CA-443
	§	
JTM INDUSTRIES,	§	
INC. and	§	
USPCI, INC,	§	
Defendants.	§	

JUDGMENT

This case came on for trial before this Court and a jury on November 28, 1994. All parties appeared in person, and by counsel, and presented evidence to the Court and the jury. Special interrogatories were submitted to the jury, and the jury answered as follows:

SPECIAL INTERROGATORY NUMBER ONE

Do you find from a preponderance of the evidence that age was a determining factor in any adverse

employment action taken by Defendant against Frank Holt?

Answer "Yes" or "No."
Answer: No

SPECIAL INTERROGATORY NUMBER TWO

Do you find from a preponderance of the evidence that age was a determining factor in any adverse employment action taken by Defendant against Linda Holt?

Answer "Yes" or "No."
Answer: No

SPECIAL INTERROGATORY NUMBER THREE

Do you find from a preponderance of the evidence that Plaintiff Frank Holt was removed as manager of the Limestone plant in retaliation for Linda Holt's filing an administrative complaint?

Answer "Yes" or "No."
Answer: Yes

SPECIAL INTERROGATORY NUMBER FOUR

What sum of money, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiff for any lost income or other damages sustained as a result of the Defendant's actions?

Answer in dollars and cents, if any, as to each Plaintiff for whom you answered "Yes" in Special Interrogatories Number One, Two or Three:

Frank Holt: $ 100,000.00
Linda Holt: $ -0-

SPECIAL INTERROGATORY NUMBER FIVE

Do you find from a preponderance of the evidence that the adverse employment actions taken by Defendant against Plaintiffs were "willful" as defined in the charge?

Answer "Yes" or "No" as to each Plaintiff for whom you answered "Yes" Special Interrogatories Number One, Two or Three.

Frank Holt: Yes
Linda Holt: No

The Court finds that Plaintiff Frank Holt is a prevailing party while Defendant Linda Holt is not. The Court further finds that the fees and expenses set forth in Plaintiff's Motion for Award of Attorney's Fees and Costs are reasonable and necessary. However, all of the hours expended and expenses incurred were not related to representation of Frank Holt; a portion had to have been related to representation of Linda Holt. The accounting system employed by Plaintiffs' attorneys does not make it possible to distinguish the fees and expenses related only to Frank Holt. Based on the evidence presented at trial, the Court believes it reasonable to approximate the fees and expenses as one-half related to Frank Holt and one-half to Linda Holt. Accordingly, the attorney's fees to which Plaintiff is entitled total $31,653.75.

And now, in accordance with the special verdict of the jury and the opinion and findings of the Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Frank Holt have judgment against the Defendant JTM Industries, Inc., for back pay in the sum of $100,000.00, liquidated damages in the sum of $100,000.00, reinstatement to his position as plant manager of the JTM Limestone facility attorney's fees in the sum of $31,653.75, plus all costs of Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Linda Holt take nothing by way of her cause of action against JTM Industries, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that both Plaintiffs, Frank Holt and Linda Holt, take nothing by way of their causes of action against USPCI, Inc., and, in accordance with Rule 50 of the Federal Rules of Civil Procedure, judgment is rendered in favor of USPCI, Inc., as a matter of law.

All relief not expressly granted herein is DENIED.

SIGNED this 1st day of February, 1995.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 17 1997
OFFICE OF THE CLERK

No. 96-1472

In The

Supreme Court of the United States

October Term, 1996

FRANK HOLT,

Petitioner,

vs.

JTM INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LIONEL M. SCHOOLER
Counsel of Record
GILPIN, PAXSON & BERSCH, L.L.P.
Attorneys for Respondent
1900 West Loop South
Suite 2000
Houston, Texas 77027
(713) 623-8800

COUNTER-STATEMENT OF QUESTION PRESENTED

The sole question presented is:

> Whether an individual, whose relative has filed a charge of discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), can sue for retaliation when he or she has not engaged in any conduct identified by the ADEA as protected?

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 29.6

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

1. Counsel. Petitioner has properly identified: Petitioner's counsel, J. PATRICK ATKINS, Esq., PHILLIP McCLEERY, Esq., and the law firm of SHEEHY, LOVELACE & MAYFIELD, P.C., Waco, Texas; Respondent's counsel of record, LIONEL M. SCHOOLER, Esq., and the law firm of GILPIN, PAXSON & BERSCH, L.L.P., Houston, Texas; and Respondent's local counsel at the time of trial, DAVID G. TEKELL, Esq., and the law firm of NAMAN, HOWELL, SMITH & LEE, P.C., Waco, Texas. Mr. LAWRENCE BESNOFF, Esq., and the law firm of OBERMAYER, REBMANN, MAXWELL & HIPPEL, Philadelphia, Pennsylvania, are of counsel to Respondent.

2. Parties/Party Representatives. Petitioner has properly identified Petitioner FRANK HOLT and his wife, LINDA HOLT.

   JTM INDUSTRIES, INC. ("JTM Industries" or "JTM") is a Georgia corporation, with its principal place of business in Kennesaw, Georgia. The chief executive officer of JTM Industries is Bill Fletcher, Kennesaw, Georgia; the Executive Vice President of JTM

Industries at the time of the events in question was Dennis Kinder, Kennesaw, Georgia; the Region Manager for the South Central Region of JTM Industries at the time of the events in question was Charles Anderson, Sugarland, Texas.

At the time of the lawsuit, JTM Industries was a wholly owned subsidiary of USPCI, Inc. (correctly identified as an acronym for "United States Pollution Control, Inc."), which was then a Texas corporation with its principal place of business in Houston, Texas. The Director of Human Resources at USPCI at the time of the events in question was Deborah Estrin; the general counsel of USPCI at the time of the events in question was Rick Walton, Esq. USPCI has been properly identified as a subsidiary of UNION PACIFIC CORPORATION.

JTM Industries is presently a wholly owned subsidiary of LAIDLAW ENVIRONMENTAL SERVICES, INC., a South Carolina corporation ("Laidlaw"), with its principal place of business in Columbia, South Carolina. The Director of Human Resources of Laidlaw is Nick Hiller.

TABLE OF CONTENTS

Page

Counter-Statement of Question Presented i

Certificate of Interested Parties Pursuant to Rule 29.6 ii

Table of Contents iv

Table of Citations v

Opinions Below, Jurisdiction, and Statutory Provision Involved 2

Counter-Statement of the Case 2

Introduction 2

Job Performance of Frank Holt 3

Linda Holt's Filing of a Charge of Discrimination . 6

Evidence Pertaining to Retaliation Claim 10

Events from June 7 Until Mr. Holt's Departure from JTM Industries 12

Proceedings in the Courts Below 14

Propriety of Denying the Writ 16

Proper Statement of the Issue Presented 16

Contents

Page

"Standing" vs. "Failure to State a Claim" 16

No Significant Conflict Among the Circuits Exists Meriting This Court's Review 22

Court of Appeals' Ruling Does Not Diminish Statutory Rights 26

Court of Appeals Avoided Judicial Legislating 27

Conclusion 28

TABLE OF CITATIONS

Cases Cited:

Clark v. R.J. Reynolds Tobacco Co., __ F. Supp. __, 27 FEP 1628, 1982 WL 2277 (E.D. La. 1982) 23

DeMedina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982) 23

E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) 19, 22, 23, 26

Flast v. Cohen, 392 U.S. 83 (1968) 19

Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979) . 20, 21

Page

Grizzle v. Travelers Health Network, Inc., 14 F.3d 261 (5th Cir. 1994) 18, 19

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 20

Holt v. JTM Industries, Inc., 89 F.3d 1224 (5th Cir. 1996) 23, 25, 26, 28

Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) 18

Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1984) 19

Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976) 23

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .. 19

Mandia v. Arco Chemical Co., 618 F. Supp. 1248 (W.D. Pa. 1985) 23

Martin v. Wilks, 490 U.S. 755 (1989) 21

McDonnell v. Cisneros, 84 F.3d 542 (7th Cir. 1996) .. 23, 25

Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) 28

Robinson v. Shell Oil Co., __ U.S. __, 136 L. Ed. 2d 808, 117 S. Ct. 843 (Feb. 18, 1997) 27

Contents

Page

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 19, 20

United States v. City of Socorro, __ F. Supp. __, 25 FEP 815, 1976 WL 523 (D.N.M. 1976) 23

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 27

Warth v. Seldin, 422 U.S. 490 (1975) 19, 20, 21

Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989) 23, 24, 25

Statutes Cited:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 623(d) 2, 16, 18, 21, 25, 26, 27, 28

29 U.S.C. § 626(c)(1) 19

42 U.S.C. § 1982 21

42 U.S.C. § 2000e-3(a) 2

42 U.S.C. § 2000e-2(n) 21

42 U.S.C. § 3604(d) 20

42 U.S.C. §§ 12101 *et seq.* 21

42 U.S.C. § 12102(2)(C) 21

Contents

Page

United States Constitution Cited:

Article III 19, 20, 21

Rule Cited:

Fed. R. Civ. P. 56(e) 19

No. 96-1472

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRANK HOLT,

Petitioner

vs.

JTM INDUSTRIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent JTM Industries opposes the petition for writ of certiorari ("Petition") filed by Petitioner Frank Holt to review the judgment of the United States Court of Appeals for the Fifth Circuit. There is no conflict among the circuits on the question presented. The Court of Appeals correctly interpreted the applicable statute in its ruling. Respondent thus requests that this Court deny the Petition.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISION INVOLVED

The Petition properly identifies the opinions and judgment below and this Court's jurisdiction pursuant to *28 U.S.C. §1254(1)*. The Petition also sets forth the one pertinent statutory provision, the "anti-retaliation" portion of the ADEA, *29 U.S.C. §623(d)*.[1]

COUNTER-STATEMENT OF THE CASE

INTRODUCTION

The United States Court of Appeals for the Fifth Circuit properly reversed the judgment of the District Court and correctly held that Petitioner Frank Holt lacked standing to assert a claim of retaliation under the ADEA on the facts of this case. There is, therefore, nothing about this case worthy of review. Petitioner seeks in the Petition to summon to his aid the resources of this Court to protect him, when he himself took none of the rudimentary steps available to take advantage of statutorily protected rights created by Section 623(d). The petition for writ of certiorari should therefore be denied.[2]

---

[1] For reasons set forth in the Statement of the Case below, the anti-retaliation provision of Title VII of the 1964 Civil Rights Act, *42 U.S.C. §2000e-3(a)*, also cited by Petitioner, is not at issue in this case.

[2] To the extent references are necessary to aid this Court in its evaluation of the petition, references to the Record on Appeal are designated as "*R.* ____"; references to the transcript of testimony prepared from the trial of this lawsuit are designated as "*Tr.* ____"; references to exhibits introduced at trial are designated as "*DX-*_____" (JTM Exhibits) or as "*PX-*_____" (Holt Exhibits).

The Petition adequately describes the business of JTM, but significantly understates the importance to JTM of its business relationship with its primary client in that area, Houston Lighting & Power Co. ("HL&P"), at its facility in Jewett, Limestone County, Texas, known as the "Limestone Facility" or "Limestone Plant". The Limestone Plant primarily serves HL&P's disposal needs emanating from its electrical generating facility across the road from the Limestone Plant. Satisfying HL&P's needs determines whether JTM's operation of the Limestone Facility can succeed financially.

The Petition accurately describes Frank Holt's tenure at the Limestone Facility between 1985 and 1993, but misleadingly creates the impression that Mr. Holt's tenure was problem-free. To present the proper context within which this case exists, including the significant evidence submitted at trial which demonstrated the long-standing and persistent job performance problems with Mr. Holt and the absence of evidence regarding retaliatory intent, Respondent is obliged to submit the following information.

JOB PERFORMANCE OF FRANK HOLT

Problems with Mr. Holt's job performance as Plant Manager date back to 1987. *Tr. 194-96; 199*; *PX-11(a)* (1988 Evaluation of Mr. Holt by Lou Marcuz).[3] The durability of these problems was such that Mr. Holt received no bonuses and no pay raises from JTM after 1990.

---

[3] Mr. Marcuz was particularly concerned about Mr. Holt's inability to delegate responsibility to others. ("**Direction and Leadership**. Delegates but funnels everything through himself. Seems reticent to allow others full responsibility.") *PX-11(a)*.

In the fall of 1991, Mr. Holt's supervisor, Charles E. Anderson, prepared a job performance evaluation of Mr. Holt (proven up at trial by Mr. Holt's own exhibit 11(e), *PX-11(e)*), which rated him "poor" in several categories, including leadership skills, training of personnel, communications with and delegation of responsibility to supervisors, and communications with employees. *Tr. 196-97*; *697-700*. Mr. Bill Fletcher, President of JTM, also communicated directly with Mr. Holt concerning persistent problems with Mr. Holt's job performance. *Tr. 765*; *785*. In the fall of 1992, a different supervisor, Mr. William Gehrmann, prepared a job evaluation regarding Mr. Holt's performance which again rated him "poor" in the same categories identified the year before by Mr. Anderson -- leadership, training, and communications. *Tr. 197-98*; *701-02*. Pursuant to an annual program of "bonus evaluations" utilized by JTM, Mr. Anderson evaluated the performance of Mr. Holt during the first three calendar quarters of 1992, and determined each time that, because of deficiencies in job performance, Mr. Holt would not be eligible for any bonus. *Tr. 280-86*; *702*; *DX-16, DX-17 and DX-18*.[4]

---

[4] Anecdotal evidence introduced at the trial substantiated the counter-productive impact of the tight-fisted style Mr. Holt wielded as Plant Manager. Mr. Dan Hohmann, who served under Mr. Holt as the Engineering Technician and Foreman at the Limestone Facility, testified regarding Mr. Holt's deleterious supervisory approach and treatment of employees. For example, Mr. Hohmann indicated that Mr. Holt controlled every aspect of Mr. Hohmann's job duties, even though he (Mr. Hohmann) was supposed to supervise other workers -- even to the point of Mr. Holt's requiring Mr. Hohmann to obtain Mr. Holt's approval before being permitted to purchase $60 worth of respirators to aid workers exposed to excess dust in their daily jobs. *Tr. 499-500*. Similarly, heavy equipment, whose uninterrupted and intact operation was crucial to JTM's landfill activities, was supposed to be serviced after every 250 hours of operation. Mr. Holt deferred maintenance until 500 hours of operation, *Tr. 501-03*,

(continued...)

Documentary and anecdotal evidence introduced at trial also revealed problems Mr. Holt caused with JTM's primary customer at the Limestone Facility, HL&P. HL&P made known to JTM on several occasions its dissatisfaction with JTM's performance under the applicable contract. *DX-6 at 103; Tr. 376-77.* Indeed, an HL&P employee who testified for Mr. Holt at trial, acknowledged that he himself complained to other JTM representatives about Mr. Holt's job performance; and also acknowledged that Mr. Holt's frequent complaints to HL&P representatives about his (Mr. Holt's) treatment by his supervisors likely detracted from JTM's relationship with HL&P. *Tr. 256; 263-64; DX-7 @ 43.*

Mr. Holt's poor job performance and his "me against them" attitude towards JTM management persisted into 1993. Mr. Holt's 1st quarter bonus evaluation in 1993 was again below standard, and he did not qualify for a bonus as a result. *Tr. 703; DX-32.* At JTM's annual meeting of managers in February, 1993, Mr. Holt was counselled by Bill Fletcher, JTM's President, and by Dennis Kinder, JTM's Executive Vice President, about problems which headquarters was experiencing with the Limestone Facility. *Tr. 539-41.* In addition to this, Mr. Anderson became aware, in the Spring of 1993, of significant deficiencies in Mr. Holt's maintenance of JTM vehicles at the Limestone Facility, to the point where some of the vehicles had even become dangerous to operate. *Tr. 675.*

---

[4](...continued)
contributing to major maintenance problems later uncovered by Mr. Anderson in 1993, as described below.

On May 19, 1993, before JTM could have been notified about the Charge of Discrimination in question, Mr. Holt and Mr. Anderson had a confrontation about Mr. Holt's counter-productive attitude following a meeting between HL&P and JTM over problems at the Limestone Plant. *DX-7 @ 59; Tr. 268-69.* Following this confrontation, in early June, 1993, Mr. Anderson learned that Mr. Holt had disclosed confidential, proprietary company information to unauthorized third parties. *Tr. 749.* At the time, Mr. Holt was subject to the requirements of a confidentiality agreement he had signed in October, 1989. Contemporaneously, JTM management learned from the HL&P Manager of its Limestone Facility (Terry Gish) that Mr. Holt had visited Mr. Gish in early June, 1993, for the express purpose of encouraging HL&P to dissolve the existing contract between HL&P and JTM and establish with the former owners of JTM a new contract for ash disposal at the Limestone Facility, with Mr. Holt as the person in charge of the operation. *Tr. 252; 384; 656-58; 693-94.*

The documentary and anecdotal evidence from the trial, much of it from Mr. Holt's own lips or pen, thus indicates that Mr. Holt considered himself immune from obeisance to company loyalty and commitment to company goals and discipline. It is against this backdrop that this Court should consider Mr. Holt's Petition.

LINDA HOLT'S FILING OF A CHARGE OF DISCRIMINATION

The Petition addresses the dates of certain events culminating in Linda Holt's filing of the Charge, but significantly understates the length of time (seven months) during which, and the context within which, Mrs. Holt's

departure from the company was under discussion.[5]

Linda Holt was employed as the Office Manager of the Limestone Facility, reporting to Mr. Holt, and she held this position until March 31, 1993, when her employment concluded following JTM's institution on or about September 1, 1992, of a company-wide "anti-nepotism" policy (*i.e.*, employees related to each other by blood or marriage could not report one to the other.) *DX-21.* This policy affected several different JTM employees, including the Holts. When the policy was announced, JTM notified the Holts that the new policy would affect them, and requested that they notify the company as promptly as possible of their decision concerning which of them would remain employed at the Limestone Facility. During September, 1992, several conversations occurred between the Holts and Mr. Fletcher, JTM's President, concerning the various options available to them in response to this new policy, including transferring back to the Holts' home state of Georgia, or to a nearby JTM facility in Florida, to work at neighboring facilities, or for one to remain at Limestone and the other transfer to another JTM facility in Texas. *R. 102-22.*

Mr. Holt admitted at trial that he had often expressed previously to Mr. Fletcher the desire to re-locate to Georgia, and recorded in his personal diary these efforts to re-locate.

---

[5] During these seven months, Mr. Holt had the opportunity to engage, but did not engage, in any statutorily protected conduct concerning the circumstances of the conclusion of his wife's employment.

DX-1 @ 37-39; Tr. 207; DX-7 @ 16; Tr. 249.[6] Mr. Holt's own written words therefore indicated that he actually perceived a transfer to another JTM facility in the southeast United States as a positive step for him, and not an "adverse" employment move, because it would remove him from a chain of command he disliked (i.e., reporting to Mr. Anderson and Mr. Gehrmann).

The Holts decided that they wanted Mr. Holt to remain employed at the Limestone Plant, for the time being, and they wanted Mrs. Holt to transfer to another location in Texas. While the original policy called for Mrs. Holt to relocate promptly, in fact she was permitted by JTM to remain employed at Limestone until March 31, 1993. Mrs. Holt posted for available positions at USPCI. She was offered the opportunity to work at two JTM facilities in Texas, but declined these opportunities. She also applied for a position at a third JTM Facility, but she was not selected for that position because she was not the best qualified applicant, nor did she express any real interest or enthusiasm for that job. Her relatively inferior computer skills, her lack of experience in customer relationships and her lack of experience in telephone etiquette in dealing with prospective customers dictated that she was less qualified than the applicant who was hired. *Tr. 469; 471; 638-43.*

Throughout this seven month process (September, 1992, through March, 1993), neither of the Holts ever stated to JTM any concern about discrimination on the basis of age, nor retaliation for any alleged conduct they engaged in.

---

[6] "[A]fter all is said and done still want out of Limestone and back to Georgia if possible said (sic) if anything opened up would keep me in mind." *DX-1 @ 38-39.*

They likewise filed no claim in their lawsuit that anything pertaining to the nepotism policy was discriminatory or retaliatory.

Following her departure from JTM, Mrs. Holt filed the subject Charge of Discrimination on or about May 10, 1993, at the Equal Employment Opportunity Commission office in Austin, Texas, with processing transferred from the EEOC to the Texas Commission on Human Rights ("TCHR"). The TCHR notification to JTM about the Charge was addressed to the Limestone Facility, at a time while Mr. Holt was still the Plant Manager. As a result, he received the TCHR envelope at the office in May, 1993, in his capacity as JTM's representative. *Tr. 146-47; 201-02.*

As highlighted by the colloquy set forth below between Mr. Holt and his lawyer at trial, without opening or reviewing the contents of the TCHR envelope, nor disclosing to upper management to what the contents of the envelope pertained, Mr. Holt forwarded the envelope to JTM's headquarters in Kennesaw, Georgia:

"Q Okay. Do you remember how it was that you forwarded the notice from the Texas Commission on Human Rights to JTM about the complaint filed by your wife? Did you mail it, is that what you did?

A It went through the mail. Whether I mailed it overnight or not, I don't know, but it did go through the mail.

Q Okay. And you didn't know what was in it, I take it?

A I assumed what was in it. I didn't read it. I didn't

know.

Q It was addressed to the JTM-Limestone Facility?

A Yes, sir.

Q And at that point you were still in charge of Limestone facility?

A Yes, sir."

Tr. 201-02 (Emphasis Added).

Thus, Mr. Holt introduced no evidence at trial to demonstrate that persons at JTM in positions of authority had specific knowledge of the Charge prior to the events of June 7, 1993, much less retaliated against Mr. Holt because of the filing of the Charge.[7] *Tr. 209; 211.* Also, Mr. Holt presented no anecdotal or statistical evidence to demonstrate any pattern of retaliatory conduct or retaliatory policies enacted or enforced by JTM or USPCI, nor any instances of retaliatory comments.

EVIDENCE PERTAINING TO RETALIATION CLAIM

During the presentation of the Holts' case-in-chief,

---

[7] Mr. Fletcher, Mr. Kinder and Mr. Anderson, the three JTM executives directly involved with Mr. Holt during the period of his re-assignment, all testified unequivocally at trial that at the time of Mr. Holt's re-assignment on June 7, 1993, none of them knew about Mrs. Holt's filing of the Charge, most likely because the information about the Charge would have been forwarded by JTM staff in Georgia directly to Deborah Estrin, the USPCI Director of Human Resources in Houston. *Tr. 543-44; 556-57; 767; 788-90.*

only Mr. Holt testified about the subject of retaliation, and his testimony is set forth below. The crux of the evidence on Mr. Holt's failure to engage in ADEA "protected conduct" is his admission at trial that he did not in any way participate in anything pertaining to the Charge or the claims of discrimination set forth in the Charge. *Tr. 147; 432.* He merely testified that he was "aware" that his wife was going to file the Charge. He took no action other than receiving an envelope for the company and forwarding it elsewhere, as demonstrated by the following colloquy, which is the entirety of the evidence on this matter:

"Q All right, sir. At the time Mrs. Holt's employment was terminated on March 31st, 1993 then you were the Plant Manager?

A Yes, sir, I was Plant Manager.

Q And she was reporting directly to you?

A Yes, sir.

Q Were you aware that Mrs. Holt was going to file a complaint with the State of Texas alleging discrimination in the termination of her employment?

A Was I aware of it?

Q Yes, sir.

A Like on the 31st?

Q Yes, sir.

A No, sir.

Q When did you become aware of it?

A Probably a day or two before she filed (she filed on or about May 10, 1993).

Q She told you she was going to?

A She told me she was going to Austin.

Tr. 147 (Explanatory Comment Added).

There was, therefore, no evidence of Mr. Holt's having engaged in any statutorily protected conduct. He did not oppose any practice proscribed by the ADEA, nor did he make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or litigation under the ADEA.

EVENTS FROM JUNE 7 UNTIL MR. HOLT'S DEPARTURE FROM JTM INDUSTRIES

The Petition misleadingly discusses the circumstances of the change in Mr. Holt's employment status with the company, and ignores or downplays the substantial efforts undertaken by the company to rehabilitate his status. Viewed in the proper context, the evidence demonstrates that JTM was confronted by Mr. Holt's stubborn resistance to management requests for improved performance, his complaints about the company to its primary customer, his failure to maintain vehicles properly, and his efforts to sabotage the company's contract with its primary customer. Because of this situation, the company placed Mr. Holt on

an administrative leave at the same rate of pay and benefits he was then receiving as Plant Manager.[8]

The Petition seeks to deflate the mendacity and antipathy of Mr. Holt's actions by focusing upon the company's decision not to terminate Mr. Holt's employment immediately. As Mr. Fletcher, the President of the company, emphasized at trial, the company recognized that Mr. Holt was incapable of managing a plant in conformity with management's directives, but the company nevertheless made efforts to give Mr. Holt one more chance, in view of his long tenure with the company and his background in ash disposal. *Tr. 767-70.*

Contrary to the assertions in the Petition, Mr. Holt admitted at trial that he was provided specific reasons why he had been placed on leave, and that no mention of the Charge was made during that meeting. *DX-1 @ 41.* He was also told that the proposal being made to him would be re-assignment to JTM's Kennesaw headquarters at his same rate of pay and benefits. *Tr. 149-50; 204-09; 230-31.* The proposal made to Mr. Holt included the company's agreement to sell or re-purchase Mr. Holt's Texas home, and to pay his family's moving expenses to Georgia. *Tr. 211-12; 770-71.* Mr. Holt accepted this proposal in writing a few days later, and coordinated a househunting trip to Atlanta at company expense. *Tr. 150; 154; 208; 215-16; 229; 543-45;*

---

[8] The deleterious impact of Mr. Holt's involvement in managing the Limestone Facility on the morale of plant employees was likewise demonstrated at the trial uncontrovertedly by witnesses who continued supervising plant employees after his departure. Both of them described the significant upturn in morale at the Facility effected by Mr. Holt's departure. *Tr. 518-19; 591.*

557; DX-42.

Contrary to the assertions in the Petition, Mr. Holt contacted Mr. Kinder about reporting for work at the new assignment, and then reported for his first two weeks of work. *Tr. 217.* However, at the end of July, without warning, Mr. Holt refused to report for work and became incommunicado. *Tr. 552-53.* He did not notify the company of reasons for his disappearance, but merely refused to report. When Mr. Holt persisted in refusing to report for work, he was notified in writing that the company was treating such a refusal as a "resignation". At all times during the period from June 7, 1993, to mid-August, 1993, Mr. Holt received the same pay and benefits he was receiving prior to being placed on administrative leave. *Tr. 218-19; 238.*

PROCEEDINGS IN THE COURTS BELOW

As stated in the Petition, the Holts filed their Original Complaint in the Waco Federal District Court on or about December 28, 1993. Petitioner now implicitly communicates to this Court that he had ironclad proof, or at least some evidence, of retaliatory conduct by JTM. This is incorrect, and was vigorously contested by JTM before the Fifth Circuit.[9]

---

[9] In fact, this fundamental defect in Mr. Holt's case has persisted throughout this litigation. In the ruling denying JTM's motion for summary judgment as to Mr. Holt's retaliation claim, the District Court noted: "While Plaintiffs present nothing to indicate that anyone involved in the employment decisions had actual knowledge that an EEOC claim had been filed by Mrs. Holt, it is hard to conceive that Plaintiff cannot establish some evidence of that at trial." *R. 717.* As is demonstrated herein, no such evidence was forthcoming.

As stated above, only Frank Holt testified on the subject of alleged retaliation, and his only testimony was to the proximity between the date he forwarded the TCHR envelope to JTM in May, 1993, and the date he was placed on administrative leave, June 7.

At the conclusion of the evidence, JTM and USPCI renewed their motion for judgment as a matter of law. The Court announced that it was declining to submit any issues for the jury to answer regarding any claims as to USPCI, in essence dismissing all claims against it. *Tr. 807.* The Court then conducted a hearing on the proposed Charge to the jury, and returned to the subject of retaliation. *Tr. 807-26.* The Court ultimately permitted the claim of retaliation to be submitted to the jury, but specifically included in the Charge only language about alleged retaliation under the ADEA, not under Title VII. *Tr. 833-37; 840.* Mr. Holt did not object to this charge as worded nor ask for inclusion of a retaliation claim under Title VII. The Charge, as finally prepared, omitted any reference to retaliation under Title VII.

Following entry of judgment, JTM timely filed its Notice of Appeal. Neither Plaintiff appealed the ruling of the District Court dismissing all claims against USPCI; Mrs. Holt did not appeal the dismissal of her claims; Mr. Holt did not appeal the dismissal of his substantive age discrimination claim or his state law claims; Mr. Holt did not appeal the District Court's exclusion of any claim of retaliation under Title VII. The proceedings before the Court of Appeals are otherwise identified correctly in the Petition.

PROPRIETY OF DENYING THE WRIT

PROPER STATEMENT OF THE ISSUE PRESENTED

It begs the question to posit, as the Petition does in Issue No. 1, whether the ADEA prohibits certain employer actions described as "retaliatory". The answer to that question is, clearly, yes, the ADEA prohibits retaliation, but only retaliation visited upon those persons who comply with the requirements of Section 623(d). The same comment holds for Petitioner's Issue No. 2.

Rather, the seminal question presented by this Petition is: Can an individual, whose relative has filed a charge of age discrimination, sue for ADEA retaliation when he or she has not engaged in a course of conduct, or even discrete acts, that are protected by Section 623(d)?

"STANDING" VS. "FAILURE TO STATE A CLAIM"

Before Congress enacted the ADEA in 1967, no private cause of action existed for alleged retaliation against an individual because of his or her involvement in opposing age discrimination against others or in aiding a third party who sought to combat alleged age discrimination in employment. By enacting *29 U.S.C. § 623(d)*, Congress explicitly created such a cause of action, stating that persons who were not themselves alleging age discrimination[10] nevertheless could bring a claim for retaliation.

On one condition.

---

[10] Mr. Holt in this case did sue over alleged age discrimination directed at him.

They had to engage in some form of protected conduct to have standing to sue.

The Petition criticizes the Fifth Circuit's ruling in this case for characterizing the issue as one of "standing". The Petition suggests that a more appropriate analysis results from transforming the inquiry into a "Failure to State a Claim" inquiry in accordance with the analytical approach adopted by certain other courts. Petition at 13, n. 2. Contrary to Petitioner's assertions, this transformation does not endow the Petition with constitutional force.

Using a "Failure to State a Claim" analysis only obscures clear evaluation: in this case, there is no worthy claimant seeking redress because he was somehow denied a day in court as the result of defective pleadings. To the contrary, Mr. Holt participated in a four-day trial, and called six witnesses to the stand, including himself. He had ample opportunity before trial to discover,[11] and ample opportunity at trial to submit, competent evidence to the Court about

---

[11] During pre-trial proceedings, the Holts initiated and conducted six (6) depositions, including two, on two separate occasions, at Kennesaw, Georgia; and two, on two separate occasions, in Houston, Texas. *R. 887, 894, 896, 900, 911, 913.* Their counsel also travelled from Waco, Texas, to Kennesaw, Georgia a third time to review at the JTM Industries corporate headquarters corporate documents responsive to a request for production of documents.

Thus, Plaintiffs' counsel undertook three separate trips to Kennesaw, Georgia, and two trips to Houston, but never sought any information pertinent to the retaliation claim -- either as to Mr. Holt's conduct or as to any involvement of JTM Industries' personnel in Kennesaw or USPCI personnel in Houston pertaining to receiving, reviewing, processing or disseminating information about the Charge. Further, the Holts never attempted to obtain any governmental agency records concerning the processing of the Charge or notifications to JTM Industries. *R. 937.*

his claims. He and his wife chose to concentrate their efforts, not on proving retaliation, but on proving claims of age discrimination *vel non*.

In calibrating correctly the boundaries of statutory eligibility, focusing upon the label used to appraise the viability of a cause of action is no substitute for scrutinizing the statute to delimit the universe of possible claimants.[12] Section 623(d) clearly establishes the boundaries:

> " It shall be unlawful for an employer to discriminate against any of his employees . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter."

29 U.S.C. § 623(d).

The leading Fifth Circuit case on the framework of an ADEA retaliation claim, *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267 (5th Cir. 1994), states unexceptionally that against this statutory backdrop, an employee's proof of a circumstantial case of unlawful retaliation commences by his proving: (1) that he engaged in activity protected by the ADEA; (2) that an adverse employment decision occurred; and (3) that there was a causal connection between the protected act and the adverse employment

---

[12] Congressional enactment of a new cause of action carries with it a description of the duty imposed, the injury protected, and the persons who are entitled to enforce it. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1513 (9th Cir. 1992).

decision. 14 F.3d at 267.[13]

The inaugural hurdle on an ADEA retaliation claimant's path of proof is, thus, whether he engaged in activity protected by the ADEA. Regardless of whether he pleads this properly at the outset, demonstrates it adequately under FED.R.CIV.P. 56(e) to survive a pre-trial motion for summary judgment, or proves it by competent evidence in a courtroom before a trier of fact -- he still has to prove it. If he does not prove it, he cannot prevail.

Mr. Holt failed to prove this elemental fact.

The Fifth Circuit's determination that this failure of proof should be called a lack of "standing" is merely a way of classifying this particular claimant outside the bounds of the universe of permitted claimants.

Petitioner invokes considerations of Article III jurisprudence to support the worthiness of the Petition. Petition at 19-20 *citing Warth v. Seldin*, 422 U.S. 490 (1975); *Flast v. Cohen*, 392 U.S. 83 (1968); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). He also postulates that because the ADEA permits "any person aggrieved" to bring a civil action, *29 U.S.C. § 626(c)(1)*, that such a prudential consideration satisfies Article III. He therefore concludes that any plaintiff who satisfies Article III

---

[13] This same test is articulated by the United States Court of Appeals for the Sixth Circuit in a case cited and relied upon heavily by Petitioner in this case. *See E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993), *citing Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1984).

requirements has standing to assert a cause of action under the ADEA.

With all due respect to Petitioner, this analysis turns the concept of "standing" on its head and, if followed to its logical conclusion, would permit any employee, at any time, to sue an employer for any "actual or threatened injury" traced to the conduct of the employer, simply because the employee somehow felt aggrieved by a particular employment decision or practice.

This Court's Article III constraints on the jurisdiction of federal courts to decide cases or controversies is frankly independent of the issue presented in this case. This case does not involve a question of constitutional dimensions. This Court in cases like *Trafficante* and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), determined whether Congress could define a class of persons with standing to sue within the limits of Article III.[14] The gist of those cases, and the related case of *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979), is that when Congress by legislation establishes a cause of action, it is constrained in doing so by the limits of Article III.[15]

---

[14] In *Havens Realty*, this Court held that the wording of section 804(d) of the Fair Housing Act, *42 U.S.C. § 3604(d)*, permitted a suit for housing discrimination by "testers" (those having no intention of seeking housing) motivated solely by a desire to combat racial steering, because Congress had conferred such a right upon them, the right "to truthful information about available housing." 455 U.S. at 373.

[15] "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' *Warth v. Seldin, supra*, at 501, 45 L.Ed.2d 343, 95 S.Ct. 2197.

(continued...)

In the present case, Congress has chosen to identify a class of persons with standing to sue which is narrower than the limits demarked by Article III, in that the wording of Section 623(d) does not describe all employees, but only those employees who engage in statutorily protected conduct. Congress has exercised such power before, as when it responded to this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989), by enacting Section 108 of the 1991 Civil Rights Act, codified at *42 U.S.C. § 2000e-2(n)*, effectively narrowing the universe of persons (otherwise authorized by *Martin v. Wilks* to sue) who could lodge challenges to employment discrimination consent decrees. Indeed, if Congress had wanted to include persons like Mr. Holt within the universe of anti-retaliation claimants eligible to sue under Section 623(d), it could easily have done so.[16] That it has not done so is of no constitutional moment.

---

[15](...continued)

In no event, however, may Congress abrogate the Article III minima[.]" *Gladstone, supra*, 441 U.S. at 100.

As pointed out also by then Associate Justice Rehnquist in his dissent in *Gladstone*, the right to sue authorized by the majority pursuant to the provisions of the Fair Housing Act would not correspondingly exist pursuant to *42 U.S.C. § 1982* because, given the wording of Section 1982, the respondents there at bar could not have been eligible to sue. *Gladstone, supra*, 441 U.S. at 128-29 (Rehnquist, J., dissenting) *citing Warth v. Seldin, supra*, 422 U.S. at 512-14 ("Plaintiffs' attempt to raise putative rights of third parties barred by the prudential rules of standing").

[16] Congress created just such an expanded universe of claimants when it enacted the Americans with Disabilities Act, *42 U.S.C. §§ 12101 et seq.* ("ADA"), affording statutory protection and a cause of action to "qualified individuals with a disability" -- a term defined to include not only persons who are actually "disabled" but also persons who are perceived as "disabled". *42 U.S.C. § 12102(2)(C)*.

Petitioner is not an outsider seeking to conduct a public protest over the employment practices of a public employer, nor a person seeking to pursue some agenda of public interest to redress the deleterious impact of employment discrimination upon a community. He is an employee, who became a "former" employee of his own volition according to the evidence, who now complains about treatment allegedly levied specifically against him by his employer.

The issue is not whether the Constitution would tolerate such a claim in federal court; the issue is whether such a claim even exists, and whether Mr. Holt has been congressionally cloaked with the exclusive status to lodge such a claim.

NO SIGNIFICANT CONFLICT AMONG THE CIRCUITS EXISTS MERITING THIS COURT'S REVIEW

Viewed in this context, Petitioner's alleged conflict among the Circuits shrivels.

In *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), a case relied upon heavily by Petitioner, the anti-retaliation claimant was an African-American protesting racial discrimination under Title VII who had already filed a charge of discrimination with the EEOC over his discharge. The employer thereafter offered to reinstatement him. 7 F.3d at 542. However, at a meeting to discuss this offer, the employer withdrew the offer after a "representative of the claimant" mentioned several incidents of allegedly discriminatory treatment in favor of Caucasian employees. 7 F.3d at 542. As the Fifth Circuit correctly opined in the case now before this Court, the *Ohio Edison* decision is

distinguishable[17] and does not conflict with *Holt* because a representative of the employee had opposed a discriminatory employment practice, a crucial event absent from these proceedings. 89 F.3d at 1227, n.2.[18]

Petitioner's citation to *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), likewise does not present an example of a true conflict. Mr. and Mrs. Wu were university professors. Mrs. Wu complained about equal pay and gender discrimination. 863 F.2d at 1545. She filed a charge with the

---

[17] Interestingly, the decision by the United States Court of Appeals for the Seventh Circuit, *McDonnell v. Cisneros*, 84 F.3d 542 (7th Cir. 1996), cited by Petitioner in support of his position on page 15 of the Petition, characterized the Sixth Circuit's *E.E.O.C. v. Ohio Edison* decision as a case involving "active opposition" by the anti-retaliation claimant. 84 F.3d at 262.

[18] The *Ohio Edison* Court, 7 F.3d at 544, n.1, does proceed to cite district court cases relied upon by this Petitioner that discuss mere status as conferring standing to sue, including *DeMedina v. Reinhardt*, 444 F.Supp. 573 (D.D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982); *Clark v. R.J. Reynolds Tobacco Co.*, _____ F.Supp. _____, 27 FEP 1628, 1982 WL 2277 (E.D.La.1982)[a decision now overruled by the Fifth Circuit's ruling in this case]; *United States v. City of Socorro*, _____ F.Supp. _____, 25 FEP 815, 1976 WL 523 (D.N.M. 1976); *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976); and *Mandia v. Arco Chemical Co.*, 618 F.Supp. 1248 (W.D. Pa. 1985).

However, the Sixth Circuit's analysis of the issue presented demonstrates that it addressed a factually different situation. After rejecting the EEOC's statement of the issue (that Title VII prohibits employers from discriminating against any and all third parties in retaliation for a co-employee's protected activity without establishing any causal link between the two) and the employer's statement of the issue (Title VII only prohibits acts of retaliation against the person actually engaged in the protected activity), the Sixth Circuit stated that the true issue was whether an employee could claim retaliation "when he has asked another employee to act on his behalf in protesting allegedly discriminatory practices". 7 F.3d at 543.

EEOC and ultimately sued. Three and a half years later, when Mr. Wu (also a professor) was removed as chairman of his department, Mrs. Wu filed a second charge with the EEOC, claiming retaliation against her for this action against her husband.[19] The specific language she used in her second charge, as quoted by the Eleventh Circuit, was: "The University retaliated against me by [Dr. John Formby] calling my husband and suggesting that he would be happier teaching somewhere else." 863 F.2d at 1547 (Emphasis Added).

The EEOC issued a no cause determination on the second charge in January, 1987. 863 F.2d at 1546. Both Mr. and Mrs. Wu filed suit thereafter. According to the Eleventh Circuit, this second lawsuit alleged unlawful retaliation "against H.K. and Kathleen Wu for bringing *Wu I*." 863 F.2d at 1546 (Emphasis Added). The Eleventh Circuit permitted Mr. Wu to participate as a plaintiff, even though he had not filed a charge with the EEOC himself, because it concluded that the filing of an additional charge by Mr. Wu was unnecessary under the circumstances. 863 F.2d at 1548. The *Wu* Court went on to hold that the district court erred in treating Mrs. Wu's retaliation claim as having been subsumed by her discrimination claim for estoppel purposes, and reversed a summary judgment on that basis.

There is, thus, no discussion in that case of the right of a person, merely because of marital status, to bring an action solely because of alleged adverse treatment of that

---

[19] The district court conducted a bench trial of the original claims in early 1986, before the EEOC completed its investigation of this second (anti-retaliation) charge. 863 F.2d at 1545.

person's spouse. *Wu v. Thomas* is therefore inapposite, and does not conflict with the holding by the Fifth Circuit in *Holt*.

The Seventh Circuit decision in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), also referred to by Petitioner, is likewise distinguishable. The Court there discusses, in *dicta*, the scope of Title VII's anti-retaliation provision, but the case specifically involved a claim of retaliation asserted by a supervisor who alleged that he was retaliated against for failing to prevent certain female employees under his supervision from filing complaints of sex discrimination with the EEOC. Calling this "passive" rather than "active" opposition to alleged discriminatory practices, the Seventh Circuit concluded that the anti-retaliation claimant's complaint should not have been dismissed. 84 F.3d at 262. It chose, however, to characterize what this claimant had done as "passive resistance", which it found actionable. It clearly did not recognize that a cause of action existed for someone merely because of his relation to an alleged aggrieved party, but rather because of the allegation that he himself had engaged in conduct to assist other persons to lodge discrimination charges -- in a manner which the Seventh Circuit called "a time-honored form of opposition". *Id.*[20]

---

[20] Petitioner apparently reads the *McDonnell* decision as ratifying an expansion of the universe of potential claimants under the ADEA by reversing the focus from overt, active, statutorily protected conduct by the claimant to a diametrically opposite focus upon what the employer allegedly thinks of the claimant, or more particularly, what the employer presumes the claimant's attitude to be about the employer's employment practices, such that this presumption by the employer, not the conduct by the claimant, justifies broadening of the statutory scope of Section 623(d).

(continued...)

The decision by the Fifth Circuit in *Holt* does appear to conflict with the EEOC regulations and interpretations cited by Petitioner on page 15 of the Petition. However, the underlying premise of the EEOC's position -- essentially that Title VII prohibits employers from discriminating against any and all third parties in retaliation for a co-employee's protected activity without establishing any causal link between the two -- was examined and rejected by the Sixth Circuit in *Ohio Edison*. 7 F.3d at 542.

COURT OF APPEALS' RULING DOES NOT DIMINISH STATUTORY RIGHTS

Petitioner asserts that the Fifth Circuit's interpretation in this case "produces absurd and unjust results", specifically, that an employer could deter an individual who wanted to exercise his own rights under the ADEA by threatening retaliation against a spouse or family member also employed by the company. No such threat occurred in this case. Indeed, Mrs. Holt had departed the company before lodging her Charge. There is absolutely no evidence that she had any contact with anyone at JTM about filing a Charge before she left; nor is there any evidence of any interaction on this subject initiated by either of the Holts or by anyone at JTM in the seven-month period between announcement of the nepotism policy and conclusion of Mrs. Holt's employment.

---

[20](...continued)

Respondent respectfully contends that the decision by the Fifth Circuit in the case at bar is truer to the plain meaning of the words of Section 623(d) and, in this context, correctly interprets Section 623(d) without need for further review by this Court.

Beyond that, the conjectured fear of deterrence which Petitioner posits hypothetically dissipates in the face of the reality that statutorily protected "participation or assistance" can, by their very nature, be concealed from the employer. In this case, for example, if Mr. Holt had secretly accompanied Mrs. Holt to Austin to aid her in filing the Charge with the EEOC, and had filled out an EEOC affidavit or statement in support of the Charge at that time, the company may never have known of such conduct. Mr. Holt had only to prove that he expressly opposed certain treatment that he considered discriminatory; or that he "testified, assisted, or participated in any manner" in the filing or investigation of the Charge to have come within the boundaries of ADEA protected conduct. As noted by the Fifth Circuit in this case, the broad wording of Section 623(d) more than adequately protects legitimate claimants who engage in even *de minimis* conduct identified as protected by the statute.

COURT OF APPEALS AVOIDED JUDICIAL LEGISLATING

As this Court recently reiterated, the first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Robinson v. Shell Oil Co.*, ___ U.S. ___, 136 L.Ed.2d 808, 813, 117 S.Ct. 843 (Feb. 18, 1997), *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). The Fifth Circuit made that determination in its opinion in this case, wisely avoiding deviation from the plain wording of Section 623(d). It declined the temptation to legislate through judicial legerde-

main an amendment to Section 623(d).[21] It chose, instead, to enforce the clearly worded statute as written, 89 F.3d at 1227, to avoid precisely those situations where non-actors who admire or support a co-worker's protest against discrimination could also compel a company to incur the significant legal fees and resources necessary to respond to, or defend against, invisible protests.

CONCLUSION

The Court of Appeals correctly decided the controversy presented to it. The failure of proof, which is evident in this case, is solely the fault of the Petitioner and no one else. This Court should deny the petition for writ of certiorari.

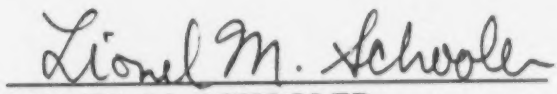
---

[21] The Fifth Circuit has already interpreted Title VII broadly enough to permit a claimant to oppose employment practices which may not be discriminatory but which the claimant nevertheless "reasonably believes" are unlawful. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140-41 (5th Cir. 1981).

PRAYER

RESPONDENT JTM INDUSTRIES, INC. therefore prays that the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,



LIONEL M. SCHOOLER
Counsel of Record
GILPIN, PAXSON & BERSCH, L.L.P.
1900 West Loop South, Suite 2000
Houston, Texas 77027-3259
(713) 623-8800
(713) 993-8451 (fax)

COUNSEL FOR RESPONDENT
JTM INDUSTRIES, INC.